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Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1977

WALTER J. FLECK, *et al.*,

Appellants,

vs.

WARREN SPANNAUS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District Of Minnesota

JURISDICTIONAL STATEMENT OF APPELLANTS WALTER J. FLECK, ET AL.

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TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Provision of the Constitution Involved	2
Statute Involved	2
Question Presented	2
Statement	3
The Question Is Substantial and Should Be Decided by This Court	5
Conclusion	12
Appendicies	
Opinion of the District Court	1a
Minnesota Private Pension Protection Act	1b
Notice of Appeal	1c

Table Of Authorities

Cases:

Alexander Champion and Thomas Dickason v. *Silas Casey* (C.C.D.R.I. 1792)	7
Church Land Cause (C.C.D.Vt. 1799)	7
Coolidge v. *Long*, 282 U.S. 582 (1931)	8
Fleck v. *Spannaus*, 412 F.Supp. 366 (D. Minn. 1976)	4
Fleck v. *Spannaus*, ... Minn. ....., 251 N.W.2d 334 (1977)	4
Fletcher v. *Peck*, 6 Cranch (10 U.S.) 87 (1810)	7, 8
Grimball v. *Ross*, T.U.P. Charlt. 175 (Ga. Super. Ct. 1808)	7

PAGE

Holmes v. Lansing, 3 Johns 73 (N.Y. 1802) 7

Home Building Ass'n. v. *Blaisdell*, 290 U.S. 398 (1934) 9

United States Trust Company v. *New Jersey* ..... U.S. ....., 52 L.Ed. 2d 92 (1977) 5, 6, 8, 9

White Motor Corporation v. *Malone*, 545 F.2d 599 (1976), *on appeal as* No. 76-1184 .....5, 6

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const., art. I, §10, Cl. 1 .....5, 7, 8, 12

Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 *Stat.* 829 11

Minnesota Private Pension Protection Act, *Minn. Stat.* §181 B.01 *et seq.* (1974), Laws 1974, chp. 437 .....3, 4

OTHER AUTHORITIES:

120 Cong. Rec. (1974) 3

134 Cong. Rec. (daily ed. Aug. 4, 1977) 11

Elliot *Debates on the Adoption of the Constitution* 7

The Federalist (Jacob E. Cooke, ed., 1961) 7

Greenblatt, Joel, Pension Benefit Guaranty Corporation, telephone interview Nov. 17, 1977 11

H. R. Rep. No. 533, 93d Cong. 1st Sess. (1973) 11

U.S. Dept. of Commerce, *1976 Statistical Abstract of the United States* 10

Warren, *The Making of the Constitution* 7

Warren, *The Supreme Court in United States History* 7

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JURISDICTIONAL STATEMENT OF APPELLANTS WALTER J. FLECK, ET AL.

JURISDICTIONAL STATEMENT

Appellants, Walter J. Fleck, a salaried employee of Allied Structural Steel Company, Edyth A. Hamler, another salaried employee of Allied Structural Steel Company, E. A. Richert, Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and Allied Structural Steel Company, a Delaware corporation, appeal the judgment of a three-judge United States District Court for the District of Minnesota which holds that the Minnesota Private Pension Protection Act, *Minn. Stat.* §181 B.01 *et seq.* (1974), which, *inter alia,* abrogated the entitlement and vesting standards of then existent

private pension contracts of employers who closed plants in Minnesota and created its own reduced entitlement and vesting standards for such a contingency, did not impair the obligation of contracts within the meaning of article I, §10, clause 1 of the Constitution.

OPINION BELOW

The opinion of the District Court is not yet reported. It is printed at App. 1a.

JURISDICTION

Appellants sued to enjoin the enforcement of the Minnesota Private Pension Protection Act as being unconstitutional. A three-judge district court entered a judgment on September 2, 1977, which it revised September 22, 1977, denying the injunction and upholding constitutionality. Appellants filed Notice of Appeal on September 28, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. §1253.

PROVISION OF THE CONSTITUTION INVOLVED

U.S. Const. art. I, §10, cl. 1 states in relevant part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

STATUTE INVOLVED

The Minnesota Private Pension Protection Act, *Minn. Stat.* §181 B.01 *et seq.* (1974); Laws 1974, ch. 437, is printed in the Appendix at App. 1b.

QUESTION PRESENTED

Do states have greater latitude under the Contract Clause of the Constitution to impair the obligation of private contracts than those of public bodies?

STATEMENT

Appellant, Allied Structural Steel Company ("Allied"), operated an office in Minnesota, employing thirty people.

In August, 1963, Allied instituted a noncontributory pension plan for its employees. Contributions to the plan were not earmarked for, nor allocated to, specific employees but were paid in a gross amount that actuaries calculated to be sufficient to meet the obligations of the contract to the covered group. The actuarial calculations assumed that not all employees would remain in Allied's employment long enough to attain vested benefits. Under the plan, an employee's benefits vested if:

1) the employee was 55 or older and his age added to his years of service totaled at least 75, or

2) the employee was younger than 55 and his age added to his years of service totaled at least 80.

Under the plan, if employees began working for Allied at age 26, their retirement benefits would vest when they reached age 53 and retired.

On April 10, 1974, the Minnesota legislature enacted the Minnesota Private Pension Protection Act.[1] It pro-

---

[1] The Minnesota Act at best was but a stop-gap, for it contained a so-called "self-destruct" provision (*Minn. Stat.* §181 B.17 App. 13b) that it was to become "null and void" upon "institution" of a federal law guaranteeing the payment of a substantial portion of an employees vested pension benefits. In fact, prior to passage of the Minnesota Act the House of Representatives had passed its version of what became the federal Employee Retirement Security Act of 1974 (ERISA) on February 28, 1974. 120 *Cong. Rec.* 4781-82 (1974). On March 4, 1974, the Senate passed its version and selected members to

vided that if an employer substantially closed a plant he would owe his employees "a pension funding charge" for all years of service over ten that were not vested under the employer's plan. In effect this imposed guaranteed, retroactive vested pension benefits after ten years of service. Under the Act, if an employee began working for Allied at age 26, his retirement benefits would vest at age 36—seventeen years earlier than under this contract with Allied. (A special master later determined that, to meet the statutorily imposed provisions, Allied would have to pay from $114,171 to $185,751 more than it had contracted to pay.)

Later in 1974, Allied began to phase out its Minnesota office and Minnesota sought to enforce the early-vesting provisions of the Act.

Allied and the fiduciaries of its pension plan brought suit in the Northern District of Illinois to have the Minnesota Act declared unconstitutional and its enforcement enjoined. The action was transferred to the District of Minnesota under 28 U.S.C. §1404.

The United States District Court for the District of Minnesota convened a three-judge court. 412 F.Supp. 366 (1976). It certified several state-law questions to the Minnesota Supreme Court, but the answers of that court left the federal constitutional questions dispositive. (*Fleck* v. *Spannaus*, ... Minn. ....., 251 N.W.2d 334 (1977)).

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[1] (Continued)
meet with representatives of the House in conference. *Id.* at 5011. The House selected its conferees on April 2. *Id.* at 9286. It was thus apparent on April 10, 1974, that any resulting federal bill would fulfill the qualifications of §181 B.17 of the Minnesota Act. The conference committee reported to the House on August 12 (*id.* at 27708) and to the Senate on August 13 (*id.* at 27997). Within ten days, both Houses passed ERISA (id. 29215-16, 29963). The President signed the bill on September 2, 1974.

In the proceedings Minnesota conceded that it impaired Allied's contracts with its employees. (App. 5a.) Nevertheless, the District Court held the Act a constitutionally permissible impairment of contracts because of the "considerable deference" it believed must be accorded state legislation impairing private, as distinguished from public, contracts. It held that what was taught in *United States Trust Company* v. *New Jersey*, ... U.S. ....., 52 L.Ed.2d 92 (1977), enforcing the Contract Clause, was limited to protection of public contracts and is not applicable to private contracts. App. 3a-4a, 8a-9a.

THE QUESTION IS SUBSTANTIAL AND SHOULD BE DECIDED BY THIS COURT

At last Term the Court, in *United States Trust Company* v. *New Jersey, supra,* invelving the contract of a public agency, held that the Contract Clause has an "important place in our constitutional jurisprudence" and that "its limitation on state power was [not] illusory"; it enforced the Clause against an agency of New Jersey and New York.

However, the opinion at bar limits *United States Trust* only to impairments of *public* contracts holding that "policy judgments" of state legislatures to impair *private* contracts are entitled to "considerable deference" even though they impose uncontracted-for burdens. App. 8a-9a. The Court of Appeals for the Eighth Circuit, in another case arising in the District of Minnesota in which the appeal did not involve the constitutional question, has found that "The Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan, obligations arrived at freely through collective bargaining, and appears in its operation to be a unique legislative act." ***White Motor Corporation*** v.

Malone, 545 F.2d 599, 604 (1976), now before this Court as No. 76-1184. The pension contract at bar was not collectively bargained as in *White Motor.* Nevertheless, it was as binding on the employer as in *White* and as enforceable, according to its terms, by employees.[2]

The "uniqueness" and boldness of the Minnesota Act is shown by the Act. It contains no recitals or legislative findings of any emergency existing in Minnesota, threat to the welfare of any substantial segment of the population or any of the rationalizations advanced by the District Court, *sua sponte,* to justify the Minnesota legislature saying, in substance, "If you substantially close a plant in Minnesota and have a pension plan, you must pay pension benefits that we ordain rather than those you contracted to pay."

If the District Court opinion be permitted to stand as a permissible gloss on, or reading of, *United States Trust,* it would mean that the limitation of the Contract Clause on state power to impair private contracts would indeed be "illusory" because, to paraphrase from the District Court opinion (App. 8a-9a), the State of Minnesota, or any state, can always assert an allegedly "strong and

[2] By separate motion filed simultaneously with this Statement we are moving that consideration of this Statement be expedited and that, if jurisdiction be noted, this case be heard at the same time as *White Motor* in which the constitutional point urged here is possibly latent. That case, involving the same Minnesota Act, comes to this Court solely on the question of whether the 8th Circuit's ruling that the Minnesota Act was pre-empted by the National Labor Relations Act was correct. The constitutional question which we urge, was pleaded, but not reached, in *White Motor,* so it is still open.

legitimate interest in protecting the economic welfare" not only of its "senior citizens" but its creditor citizens, its young parent citizens, etc. *ad infinitum.*

The vast business and wealth of the country is regulated largely by private, not by public, contracts. Stability of the former was basically what the Constitution was designed to protect:

Edmund Randolph, in the Virginia Convention which ratified the Constitution, argued that the Contract Clause was beneficial because it prevented "interferences of the State Legislatures with private contracts." Warren, *The Making of the Constitution,* at 555, quoting Elliot's *Debates on the Adoption of the Consitution,* III, 478-79. James Madison, writing as Publius in Federalist No. 44, maintained that the Contract Clause proscribed "legislative interferences in cases affecting personal rights." *The Federalist* at 301 (Jacob E. Cooke, ed., 1961). Soon after the Constitution was adopted, courts held that the Contract Clause prevented state legislatures from interfering with private contracts. See *Alexander Champion and Thomas Dickason* v. *Silas Casey* (C.C.D.R.I. 1792) and *Church Land Cause* (C.C.D.Vt. 1799), both described in I Warren, *The Supreme Court in United States History* at 66-9. *Cf. Holmes* v. *Lansing,* 3 Johns. 73 (N.Y. 1802) and *Grimball* v. *Ross,* T.U.P. Charlt. 175, 180-81 (Ga., Super. Ct. 1808) (laws held not to violate the Contract Clause).

The first application of the Clause to the protection of public contracts appears to be *Fletcher* v. *Peck,* 6 Cranch (10 U.S.) 87 (1810), in which Chief Justice Marshall said:

> Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between

> two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. (6 Cranch at 137)

Marshall then went on to demonstrate that public contracts were protected. It is worthy of note that in Justice Johnson's partial dissent he said:

> There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection of individual rights against the acts of state legislatures. (6 Cranch at 144)

Application of the Contract Clause to public contracts, as both *Fletcher* v. *Peck* and later cases demonstrate, is restricted by the fact that one legislature, by converting its acts into contracts, cannot prevent the exercise of legitimate police power by subsequent legislatures. (*United States Trust,* 52 L.Ed.2d at 110-11.) Private contracts suffer no such inhibition.

Whatever may be said as to application of the Contract Clause to public contracts, it is beyond doubt that the District Court has attempted to reverse history and all legal teaching by propounding a doctrine that private contracts are less protected by the Constitution than public contracts, or, stated another way, a doctrine that a more lax standard of review is applied in reviewing legislation impairing private contracts than that impairing public contracts. This doctrine has not heretofore been the law. *See, e.g., Coolidge* v. *Long,* 282 U.S. 582 (1931).

The severity of the impairment is without question. In *United States Trust,* as the dissent points out, 52 L.Ed.2d at 121-23, there was no attempt to alter either the principal or interest obligations of the bonds in question, but an effort to change the underlying funding arrangement. Nevertheless, the Court held the legislation unconstitutional.

As we read the dissent in *United States Trust,* there is nothing in it, taken in factual context, that justifies what the District Court did here. It is our view that on plenary hearing the Court, even though it divided in *United States Trust,* can and should unite in reversing the District Court. The Act here is "unique" as found by the 8th Circuit; it is unprecedented. *Cf. Home Building Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934). Here, the legislature did much more than alter a remedy. This Act makes a new contract for the parties, forcing retrospective burdens or obligations on one and emoluments on the other. If the District Court opinion be permitted to stand and spawn progeny, there would be scant limit to what state legislatures could do to existing contracts—the populace would be subjected to legislative impetuosity and tyranny.

True, states can impair contracts, but only if it is both reasonable and necessary to serve an important public purpose (*United States Trust,* 52 L.Ed.2d at 114). But enforcing retrospective vesting earlier than a pension plan provides is not such a purpose. At most, late vesting is an unsatisfactory way of structuring a pension plan;

it is not an over-riding danger to the public. Most of the public, particularly in a predominantly agricultural state, does not enjoy private pensions.[3] The Minnesota Act, as heretofore voted, contains no recitals of any threat to the welfare of the public, nor legislative findings of an emergency, nor any of the rationalizations advanced *sua sponte* by the District Court. There is no showing of any important public purpose that would justify the legislature's forcibly adding obligations to existing contracts.

The unreasonableness of the Minnesota Act, even assuming a public need, is shown by contrasting it to the

[3] Less than one-third of Minnesota's non-government workers had private pensions, as tabulated below, assuming that, in Minnesota, the percentage of employees with private pensions was the same as that in the United States. Of course, most of these pensions were unaffected by the Minnesota Act because not many plants with pension plans were closed. The column below, "Thousands of Employees", is taken from U.S. Dep't of Commerce, *1976 Statistical Abstract of the United States* at 367 and 633. The column 'Percent of Employees with Private Pensions" is taken from *id.* at 307. The final column is calculated.

Occupation	Thousands of Employees	Percent Of Employees With Private Pensions	Thousands Of Employees With Private Pensions
Farm	483	7%	34
Wholesale & Retail	370	35%	129
Manufacturing	313	61%	191
Services	279	24%	67
Transportation and Public Utilities	90	61%	55
Finance, Insurance and Real Estate	75	52%	39
Construction	62	34%	21
Mining	14	72%	10
Totals	1,685		546 or 32.4%

Employee Retirement Income Security Act of 1974 (ERISA), P.L. 93-406, 88 *Stat.* 829. Even though Minnesota is commanded by the Constitution to respect existing contracts while Congress is not, Congress was far more respectful of contract rights than was Minnesota. For example, Representatives Ashbrook, Erlenborn, Eshleman, Hansen and Quie believed Congress lacked the constitutional power to "change the contract of an employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." Supplemental Views, *H. R. Rep. No.* 533, 93d Cong., 1st Sess. (1973). Congress acted prospectively in lowering vesting and entitlement requirements and did not force any employer to change his contracts. ERISA was signed by the President on September 2, 1974, to become effective in part on January 1, 1975, and in other parts at the start of the first pension plan year commencing after January 1, 1975. An employer dissatisfied with ERISA could keep any pension plan he wished, with the only penalty being the possible loss of a tax deduction. Or he could simply terminate his plan. Many did so.[4] Minnesota did not even grant employers this element of fairness. Minnesota did not give objecting or financially pressed employers any way of avoiding the legislatively imposed terms; it rewrote the terms of the employment contracts by *force majeure.*

[4] In a speech on the Senate floor, Senator Javits reported that an IRS survey indicated that perhaps 30% of the pension plans existent before ERISA was passed may close down. 134 *Cong. Rec.* S 13528 at S 13530 (daily ed. Aug. 4, 1977). From ERISA's enactment to November 5, 1977, over 19,000 pension plans filed to terminate. Telephone interview on November 17, 1977 with Joel Greenblatt, Pension Benefit Guaranty Corporation, 2020 K St. N.W., Washington, D.C. 20006 (202) 254-4817.

CONCLUSION

It is respectfully suggested that if the District Court opinion is not reviewed it will stand as precedent that *United States Trust Company* v. *New Jersey*, which was most carefully considered by this Court, applies only to public contracts—that the vast majority of the contracts in this country fixing the rights of rich and poor, debtors and creditors alike, have but illusory protection under the Contract Clause, for it is difficult to imagine a more direct assault upon the obligation of private contracts than that authorized by the opinion of which we seek review.

Respectfully submitted,

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November 25, 1977

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 3-75 Civ. 178

Walter J. Fleck, Edyth A. Hamler, E. A. Richert, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and Allied Structural Steel Company, a Delaware corporation,

Plaintiffs,

v.

Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan,

Defendants.

Before HEANEY, Circuit Judge, and DEVITT and ALSOP, District Judges. [Filed September 2, 1977]

HEANEY, Circuit Judge.

The plaintiffs brought this action to contest the enforceability and constitutionality of the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §181B.01 *et seq.* (1974) (hereinafter the Pension Act). The relevant facts are set forth in *Fleck* v. *Spannaus*, 412 F.Supp. 366 (D. Minn. 1976). In that decision, Judge Alsop held that the Pension Act was not preempted by the Employee Retirement Security Act of 1974, 29 U.S.C. §1001 *et seq.* (hereinafter ERISA) until January 1, 1975, and that a three-judge court was necessary to decide the various constitutional issues raised. On August 5, 1976, the three-judge court certified several questions to the Minnesota Supreme Court concerning the Pension Act's "self-destruct" provisions and held that the individual plaintiffs, two employees of Allied Structural Steel Company (hereinafter Allied) and the pension fund trustee, lacked standing to sue. In addition, the court ordered the appointment of a

special master to take evidence and make findings on certain factual matters.

Pursuant to Judge Alsop's certification order, the Minnesota Supreme Court held that the Pension Act continued in effect until January 1, 1975, when the provisions of ERISA preempted the state act and that this preemption preserved the pending causes of action. In other words, the terms of the Pension Act were in force and applicable to the eleven employees terminated by Allied on July 31, 1974.

On April 7, 1977, the special master issued his findings to which the parties subsequently stipulated. In particular, he found that:

1) it was impossible to determine which contributions by Allied to the plan were allocable to the terminated employees;

2) there were insufficient assets in the pension fund to pay the terminated employees after paying all employees who had vested rights under the plan;

3) the possibility of a plant closure was not considered in calculating Allied's annual contributions to the pension plan; and

4) the cost of prepaid deferred annuities which Allied would have to purchase for the terminated employees ranged from $114,171.93 to $185,751.00.

Before this three-judge court, Allied claims the Pension Act suffers the following constitutional infirmities:

1) it impairs the obligation of contract; and

2) it violates the due process, equal protection and commerce clauses of the United States Constitution.

Although Allied raises each of these issues in its initial complaint, they seem to rely almost entirely on the contract clause argument. Accordingly, our decision will focus primarily on this issue.

I. *The Impact of United States Trust Co. of New York v. New Jersey.*

Over the last century, the Contract Clause of the United States Constitution has played a limited role in constitutional adjudications concerning limitations on state power. A recent decision of the United States Supreme Court, *United States Trust Co. of New York* v. *New Jersey*, ... U.S. ....., 52 L.Ed.2d 92 (1977), provides the most definitive statement on the current status of the Contract Clause. This case involved a statutory covenant between New York and New Jersey which limited the ability of the Port Authority to subsidize rail passenger transportation from revenues and reserves pledged as security for bonds issued by the Authority. In 1974, the legislatures of both states repealed the security promise in the 1962 covenant. The legislation was sought when it became apparent that, in providing a greater share of its revenues for rail mass transit, Port Authority reserves would drop below levels promised as security in the original covenant. *United States Trust Co. of New York* v. *New Jersey, supra* at 52 L.Ed.2d 102-104.

In assessing the bondholders' Contract Clause challenge, the Supreme Court began by drawing an important distinction between general regulatory legislation impairing a range of private contracts and legislation abrogating a particular contract to which the state was a party. As to the former, the Court acknowledged that a more relaxed standards of review must apply; but when the state itself was a party, it conceded that complete deference to the legislature's judgment was inappropriate.

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. • • • As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> • • • •

> In applying this standard [to the instant case], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.

United States Trust Co. of New York v. *New Jersey, supra* at 52 L.Ed.2d 109-110, 112.

Thus, an important first step in analyzing the constitutionality of a particular impairment is to determine the nature the contractual relation with which the law conflicts.

A second issue addressed by the Court in determining the constitutionality of a particular impairment is the extent of that impairment. *Id.* at 113. Without drawing a clear distinction between substantial and insubstantial impairments, the Court, at several points in the opinion,[1] suggested that a factor to be considered in determining the extent of impairment is the legitimate expectations of the contracting parties. Apparently, to the extent the obligation imposed or abrogated by the challenged legislation was, in fact, or could have been anticipated by the contracting parties, the impairment of those bargained for expectations is diminished.

Ultimately, the Court held that an impairment can be sustained only if reasonable and necessary to serve important purposes of the state. *Id.* at 114. Total repeal of the 1962 covenant was not necessary, in the Court's judgment, because less drastic modifications of the security terms would have accomplished that state's objectives. The legislation was not reasonable because the state was well aware of pending mass transit problems when the covenant was enacted. *Id.* at 114, 115.

With this review of the Supreme Court's most current statement on the Contract Clause, we now turn to the instant case.

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[1] *United States Trust Co. of New York* v. *New Jersey*, ... U.S....., 52 L.Ed.2d 92, n.17, n.26 (1977).

II. *The Extent of Impairment.*

Allied argues and the State of Minnesota seems to concede that there has been an impairment of contract. Our attention is directed then to the extent of that impairment. In this regard, Allied contends that the impairment is substantial because the Pension Act burdens employers with pension obligations that were actuarially anticipated.[2]

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[2] The actuarial assumptions and funding method used in developing the Allied pension plan are set forth at Exhibit 7 of the Special Master's Findings:

Mortality rates—Group Annuity Table for 1951 projected to 1960, set back 5 years for women.

Disability rates:

Age	*Rate (%)*
37	.1
42	.1
47	.2
52	.6
57	1.1
62	3.2

Termination rates before retirement, all causes:

	Rate (%)	
Age	*Men*	*Women*
22	5.4	5.4
27	4.5	4.5
32	3.3	3.3
37	2.0	2.0
42	1.0	1.0
47	.7	.5
52	1.3	1.0
57	2.2	1.8
62	4.9	4.3

Salary scale:

Age	*Present salary as a percent of salary at 65*
22	33.1%
27	40.9
32	49.0
37	57.4
42	65.9
47	74.4

First, Allied argues that their contributions to the pension plan were actuarially determined on the basis of certain assumptions and that by providing benefits to those who would have forfeited their benefits under those assumptions, unanticipated liability is imposed. This argument is belied by Allied's own admission that the possibility of plant closure was not relied upon by their actuaries in calculating plan contributions.[3]

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[2] (Continued)

52	82.8
57	91.1
62	98.2

Retirement age—66, or completion of service requirement if later.

Interest rate—4½%.

Valuation of assets—At cost, with accrual of unpaid compnay contribution.

Funding method—Entry age normal—cost-frozen initial liability.

[3] Allied's argument in this regard does highlight a different aspect of the termination problem. Because plant closure is not actuarially anticipated, forfeiture of pension benefits for this reason may actually provide a windfall to the employers. As noted in *Lucas* v. *Seagrave Corporation*, 277 F.Supp. 338, 345 (D. Minn. 1967):

> [I]t has been asserted that an employer's pension plan contributions are determined by an actuarial formula which assumes that any employee whose employment is terminated, forfeits his pension benefits. • • • However, such an assumption may not cover the occurrence of a group termination. The actuarial formula assumes a reasonable turnover rate for employees established by experience with individual separations over a period of time. Where there is a termination of a substantial number of the plan participants, it seems clear that such a turnover is not anticipated by the formula. The result is that an employer who has discharged a relatively large number of employees receives a windfall, palpably in excess of acturial assumption, in the form of pension credit forfeitures which he can use to relieve for some time his future premium liability for the remaining employees.

Closely paralleling the preceding argument, Allied claims that the ten-year vesting provision of the Pension Act imposes liability which was not anticipated by Allied or its actuaries. We do not quarrel with their claim that an acceleration of vesting was not anticipated and that the Pension Act impaired Allied's employment agreement in this regard. Nevertheless, we do not believe the obligations imposed by the Pension Act unconstitutionally expand upon the contracting parties initial expectations or the actuaries' original assumptions.

Generally, employer contributions to pension plans are determined in the following fashion. Actuaries first calculate the amount an employer is likely to pay out in benefits over the course of the plan; this calculation, of course, is based on certain assumptions regarding mortality, job changes, and other causes of employee turnover.[4] To meet this anticipated liability, the actuaries next project the amount an employer must contribute to adequately fund these future payments. For example, an actuary may determine that annual contributions of two or three percent of payroll are necessary to meet the first series of anticipated payments and to accumulate an interest-earning reserve to cover the remainder of the plan.

Certainly, Allied did not and could not be expected to anticipate the possibility of vesting at an earlier date for the terminated Minnesota employees. But, the claim that payment to these employees was not anticipated distorts the way actuarial assumptions and funding plans operate and ignores the fact that a portion of Allied's annual contribution was made to accumulate a reserve sufficient to make payments to these employees at some future date. In other words, while the date of payment could not be anticipated, the likelihood of payment was, as was the need, to accumulate a reserve for that purpose.

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[4] *See* n.3, *supra*.. We note again that these assumptions do not include the prospect of plant closure.

We raise the preceding arguments not to suggest that a sufficient fund has accumulated in the Allied pension plan out of which Pension Act liabilities can be paid. In fact, the Pension Act does not impose any liability on pension plan funds for the payment of forfeited benefits. The Act specifically provides that the *employer* is liable for payment of the pension funding charge and that funds already contributed to the plan are to remain for the benefit of continuing employees. *See* Minn. Stat. §§181.03-.07, [*sic*] 181B.02 subd. 18, and 181B.16 (1974). Rather, the arguments raised above are offered to shed some light on the concerns expressed by the Supreme Court in *New York Trust* for the "legitimate expectations of the contracting parties." We believe the obligations imposed by the Pension Act are not so significantly beyond the parties' initial expectations that the Act should be declared unconstitutional.

III. *The Reasonableness and Necessity of the Impairment.*

As reaffirmed in *New York Trust,* the standard for reviewing state legislation impairing private contracts varies with the nature of that contractual relationship. When the state is not a party to the contract, far greater deference is given to the legislative judgment that the impairment is reasonable and necessary to the accomplishment of legitimate policy aims. In granting states broader powers to adopt general regulatory measures, it is probably assumed that the legislature will act impartially and in the best interest of all when it is not itself a party to the contract impaired. Note, *The Constitutionality of the New York Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause,* 125 U.Pa.L.Rev. 167, 188-191 (1976). Since the State of Minnesota was not a party to the contracts allegedly impaired by the Pension Act,[5]

[5] The contracts allegedly impaired by the Minnesota Pension Act are: (1) the employment agreements entered into by Allied and its employees, and (2) the trust agreement between Allied and the trustee of its pension plan.

we must review that legislation with considerable deference to the policy judgments of the Minnesota legislature.

Before addressing the reasonableness and necessity of the Pension Act provisions, we must first examine the various policy aims that led to its enactment. *United States Trust Co. of New York* v. *New Jersey, supra* at 52 L.Ed.2d 112. When plants shut down, employees lose both their jobs and, in many cases, their pension rights. Accumulated pension credits may be forfeited even when terminated employees are within a few months of qualifying for retirement. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals,* 76 HARV.L.REV. 952 (1962) (hereinafter Bernstein). The loss sustained by separated employees can be viewed either as a future loss of retirements income or as a present loss of compensation corresponding to the amount of employee contributions on their behalf.

Certainly, the State of Minnesota has a strong and legitimate interest in protecting the economic welfare of its senior citizens by assuring the receipt of earned pension benefits as a form of retirement income. The forfeiture of anticipated retirement income is particularly hazardous because it affects individuals at an age when they often

[5] (Continued)
The terms of the employment agreements included wage rates, working conditions and fringe benefits, one of which was a pension plan with vesting to occur after twenty years. The Pension Act allegedly impairs those agreements in that it requires vesting of pension benefits after ten years if Allied ceases to do business or substantially reduces its work force in Minnesota. The terms of the trust agreement require payment by Allied in accord with actuarial projections which are predicated on vesting after twenty years. The Pension Act allegedly impairs that agreement because Allied must incur additional expense to provide benefits for persons whose benefits would be forfeited by plant closure.

have no other source of substantial income.[6] Mass forfeiture of retirement benefits is likely to adversely affect the employees' immediate economic community through the loss of buying power and increased demand for welfare funds and related services.[7]

But, in our judgment, the loss of retirement income is only one aspect of the problem. Pension plans are usually instituted as a means of attracting and holding employees. Berstein, *supra* at 964. Individuals who decide to work for an employer who offers a pension plan over an employer who does not, choose, in essence, to sacrifice the higher salary the non-plan employer may pay for the

[6] The three major sources of income for those of retirement age are private pensions, social security benefits and private savings. *See* C. Siegfried, *"The Role of Private Pensions" in Private Pensions and the Public Interest* 7, 9 (1970). While social security benefits are available to a wide segment of the elderly population, those benefits by themselves seldom provide sufficient income to meet ever-increasing costs of living. *See, e.g.*, R. Nader and K. Blackwell, *You and Your Pension* 13 (1973). And it is widely acknowledged that few individuals are able to accumulate sufficient savings through their working years to provide significant income after retirement. *See generally* M Bernstein, *The Future of Private Pensions* 155-157 (1964).

[7] Congress explicitly recognized the same concerns during hearings on the bills that were eventually enacted into law as ERISA:

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire.

S. Rep. No. 93-383, 93rd Cong., 2d Sess. (1974); Pension Reform Act, 8A *U.S. Code Cong. and Adm. News* 508, 516 (1974); H.R. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), Pension Reform Act, 8A *U.S. Code Cong. and Adm. News* 288, 294 (1974).

security of retirement income. Employer contributions to pension funds must be recognized as a substitute for present compensation. As one authority explains,

> Unions and employers are often quite specific in equating employer pension plan contributions with employee wage compensation. Unions demand increases of X cents per hour in money wages and Y cents per hour in fringe benefits, including pension plan contributions. Employers respond with counteroffers in precisely the same terms.
>
> • • • •
>
> The basic purposes of nonbargained plans are the same as those of bargained plans. As far as employees are concerned the purposes of the plan are to provide income when age forces retirement from employment. • • • Thus, as a general proposition, nonbargained plans seem no less a part of employee compensation than bargained plans.
>
> Since the *Inland Steel*[8] case the courts and the National Labor Relations Board have held pension plans to be "wages" and, in addition, "condition[s] of employment" under the Labor-Management Relations Act of 1947 and its predecessor, the Wagner Act. • • • The demand to bargain [in *Inland Steel*] did not turn the contribution and the pension plan into "wages"; rather it was the nature of the inducement by the company to the employees and the value of the contributions and the benefits to the employees which made them "wages."

Bernstein, *supra* at 960-961.

Thus, the loss sustained by terminated employees has both present and future implications for the employees themselves and for their immediate community we have no trouble concluding that the Minnesota legislature, in en-

[8] *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, *cert. granted on other grounds and aff'd*, 338 U.S. 382 (1949).

acting the Pension Act, was addressing a problem of vital public interest.

The next area of inquiry is whether the terms of the Pension Act are reasonably adapted to and necessary for the accomplishment of these vital interests. We think they are. Allied contends that the provisions of the Act are neither reasonable nor necessary because: (1) the Act was designed to benefit only a limited class of persons, (2) the Act does not provide for a grace period during which an employer whose pension plan was not fully funded might reach full funding, and (3) the Act does not permit employers to voluntarily terminate their pension plans.

Admittedly, the Pension Act does not address all the problems existing in private pension programs. The Act prevents only the forfeiture of accumulated pension benefits by substantial numbers of employees when that forfeiture is caused by plant closure. It is well established, however, that in exercising its police powers, a state need not address all aspects of a particular problem. As observed by the Supreme Court in an analogous police power decision,

> [i]n establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt.

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495, 519-520 (1937) (citations omitted).

It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan. However, Allied's contention that the Pension Act was aimed solely at White Motor retirees is totally unfounded. There is absolutely no evidence from the legislative history or debates on the Pension Act to support Allied's claim that the Act was aimed solely at White Motor Corporation.

Allied's other contentions that a grace period was not allowed and that there was no option to voluntarily terminate its plan can be answered quite simply. Undoubtedly, the Minnesota legislature rejected both of these alternatives because either would have been inconsistent with the Act's central purpose—to assure some measure of retirement income to those affected by present plan closures and plan terminations. Although the legislature might have adopted a less drastic means to accomplish its purpose, the approach it chose is not unreasonable or arbitrary merely because it requires funding to commence from the date of enactment.

IV. *The Commerce Clause Challenge.*

Allied claims that interstate commerce is unreasonably burdened because the Pension Act's funding charge discourages Minnesota employers from terminating their operations in this state and moving them or their investment capital elsewhere. Relying on *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), Allied argues that the Pension Act, in effect, requires business operations to be performed in the home state when those operations could be more efficiently performed in another. *Id.* at 145. In *Pike*, the Supreme Court set forth the standard for determining whether state legislation unduly burdens interstate commerce:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of

> the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted).

It is clear from the statutory language of the Pension Act that local and interstate commerce are treated alike. Any employer of 100 or more employees who terminates a pension plan or ceases operations in the state is affected by the Act. *See* Minn. Stat. §§181B.02, subd. 2, 181B.03-06. As held above, the Act clearly effectuates a vital and legitimate policy of local interest. Thus, the question becomes whether the burden imposed on interstate commerce is excessive in relation to that legitimate local benefit. We do not think it is excessive.

The Pension Act burdens commerce in much the same way as other forms of employer protection legislation; the costs of doing business in Minnesota are increased to further an important state policy. Costs of a similar nature are imposed by workmen's compensation, unemployment compensation and social security statutes and each has been upheld against constitutional attack. *See Helvering* v. *Davis*, 301 U.S. 619 (1937) (social security); *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 219 (1937) (unemployment compensation); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917) (workmen's compensation). The local policy effectuated by the Pension Act is equal in importance to aims achieved by the preceding legislation. In our judgment, this vital interest outweighs the attendant burdens on interstate commerce.[9]

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[9] Two recent Supreme Court cases sustaining Commerce Clause attacks on state legislation do not compel a contrary result. Both involved state interests of considerably less importance. In *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976), the State of Mississippi claimed that a regulation allowing the sale of outstate milk products in Mississippi only if the selling state accepted Mississippi milk products on a reciprocal basis was enacted to maintain state health standards. The Court regarded this purported justification as "border[ing] on

V. *The Due Process Challenge.*

Allied asserts that the Pension Act violates the Due Process Clause of the Fourteenth Amendment by divesting Allied of property rights—the right to withhold pension benefits for failure to meet age and service requirements it had contracted for prior to the Act's passage. The considerations involved in Allied's due process challenge are substantially the same as those previously considered under the Contract Clause. We have held that the Pension Act is a valid exercise of the state's police power aimed at protecting an important and legitimate interest of certain state residents. For that reason, we need only address here those arguments peculiar to Allied's due process challenge: namely, whether the Pension Act is retroactive in application and, if so, whether that retroactivity violates the Due Process Clause.

Allied argues that the Pension Act's funding charge is based on pension benefits earned prior to enactment of the legislation. It is true that the Act does look to service performed prior to enactment to determine the amount of accumulated benefits, but the events which trigger the funding charge all occur after the effective date of the Act, April 10, 1974. Thus, the Act is directed only at forfeitures which arise from plant closures occurring after April 10.

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[9] (Continued)

the frivolous." *Id.* at 375. In *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), an Arizona statute required cantaloupes grown in the state to be packed in conformity with certain standards and approved by a state supervisor. The practical effect of the statute was to compel an Arizona grower, with adequate packing facilities thirty-one miles away in California, to build similar facilities in Arizona. *Id.* at 140. The purpose of the statute was simply "to protect and enhance the reputation of growers within the State." *Id.* at 143. The Court held, "such an incidental consequence of a regulatory scheme could perhaps be tolerated if a mere compelling state interest were involved. But here the State's interest is minimal at best. • • •" *Id.* at 146.

Accord, Willys Motors v. *Northwest Kaiser-Willys,* 142 F.Supp. 469 (D. Minn. 1956). Allied closed its Minnesota plant on July 31, 1974, over three months after the effective date of the Pension Act.

Even if we found the Act to operate retroactively, that alone does not render a statute invalid. It is well settled that legislation aimed at a legitimate local interest may be valid irrespective of any retroactivity. *See, e.g., Usery* v. *Turner Elkorn Mining Co.,* .... U.S. ...., 49 L.Ed.2d 752 (1976); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962). The Supreme Court set forth the relevant test for determining whether retroactive legislation is valid as an exercise of the state's police power in *Goldblatt* v. *Town of Hempstead, supra* at 594-595:

> To justify the state in * * * interposing its authority in behalf of the public, it must appear—first, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

For the reasons stated above, we believe the Pension Act accomplishes a vital public interest, is reasonably adapted to that end and is not unduly oppressive in its impact on Allied. It is valid, therefore, irrespective of any alleged retroactive effect.

VI. *The Equal Protection Challenge.*

Allied commences its equal protection challenge with the claim that in recent years, the "rational basis" standard for determining the validity of state statutes has been replaced by a new test which requires that the classification bear a substantial and significant relation to its claimed objective. *Women's Liberation Union of Rhode Island, Inc.* v. *Israel,* 379 F.Supp. 44, 49-50 (D. R.I. 1974), *aff'd,* 512 F.2d 106 (1st Cir. 1975). *See Dorrough* v. *Estelle,* 497 F.2d 1007, 1011 (5th Cir. 1974); *Lucas* v. *Secretary, Dept. of HEW,* 390 F.Supp. 1310 (D. R.I. 1975). A close examination of these decisions reveals that the emerging middle standard of review, somewhere between the rational basis

test and strict judicial scrutiny, has been applied to classifications falling just short of the "suspect classification" category or of infringing fundamental rights.[10] Recent decisions of the Supreme Court demonstrate unequivocally that where business or economic regulation is at issue and no potentially suspect classification is involved, the traditional rational basis standard still applies. *City of New Orleans* v. *Dukes,* ..... U.S. ....., 49 L.Ed. 2d 511 (1976); *Borass* v. *Village of Belle Terre,* 416 U.S. 1 (1974). Thus, because Allied challenges local economic regulation, we must give considerable deference to the classifications chosen by the legislature and uphold those classifications "if any state of facts reasonably may be conceived to justify [them]." *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

The first set of challenged classifications are readily justified under the relevant standard. They are:

1) the Act's regulation of employers with more than 100 employees while failing to cover smaller employers; and

2) the Act's exclusion of state and local government employees and employees of tax-exempt organizations.

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[10] In *Dorrough* v. *Estelle,* 497 F.2d 1007 (5th Cir. 1974), the emerging middle standard was applied to the classifications in a Texas statute denying a criminal appeal to certain classes of criminal escapees. A Rhode Island statute excluding women from certain types of bars was more carefully examined by the court in *Women's Liberation Union of Rhode Island, Inc.* v. *Israel,* 379 F.Supp. 44 (D. R.I. 1974), *aff'd,* 512 F.2d 106 (1st Cir. 1975). Finally, in *Lucas* v. *Secretary, Dept. of HEW,* 390 F.Supp 1310 (D. R.I. 1975), the court followed the standard applied in *Women's Liberation Union of Rhode Island, Inc.* v. *Israel, supra,* to strike down distinctions drawn between legitimate and illegitimate children.

In our judgment, these exclusions are based on rational policy aims. First, national and statewide experience indicated that plan terminations by major private businesses caused hardship to the greatest number of aged citizens and imposed the most severe burden on states to remedy those hardships through public assistance. Certainly, it was not unreasonable for the legislature to fashion a remedy appropriate to the most immediate need. Similarly, tax-exempt organizations and state and local government employees were excluded because the legislature determined the need for protection was greatest in private industry of substantial size. ERISA excludes tax-exempt and public employees for the same reason. 29 U.S.C. §1003(b)(1), (2).

Allied also attacks the exclusion of employers who have made the maximum allowable contribution deductible under §404 of the Internal Revenue Code for a designated sum of years preceding termination. This exclusion is justifiable on the ground that one of the Pension Act's obvious purposes is to encourage employers to fund their plan to the maximum extent possible. It seems perfectly reasonable to exclude those employers who have attempted to maintain a relatively high funding level. The maximum deductible contribution was simply taken as a readily identifiable bench mark for separating out plans more likely to be adequately funded.

Finally, Allied challenges the Pension Act's exclusion of "non-qualified" plans under §401 of the Internal Revenue Code. The defendants argue that this classification was drawn to reduce the coverage of the Act to make it administratively manageable. While we have some doubts about this rationale, there is justification for assuring that state resources allocated to policing the Act are kept within manageable limits. *See Mathews* v. *Lucas*, ... U.S. ....., 49 L.Ed.2d 651 (1976).

For these reasons, we find no violation of the equal protection clause.

In accord with the preceding discussion, the Pension Act is sustained against each constitutional challenge.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law. Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Spielman and against Allied Structural Steel Company Salaried Employees' Pension Plan. Costs and disbursements will be taxed to the plaintiffs.

DATED: September 2, 1977

(CAPTION OMITTED IN PRINTING)

(FILED SEPTEMBER 22, 1977)

ORDER

The unpublished Memorandum Opinion in the above styled case, filed September 2, 1977, is amended as follows:

ON PAGE 17, LAST PARAGRAPH: Delete from the end of the second sentence the words "Salaried Employees' Pension Plan". The sentence should now read: "Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Speilman and against Allied Structural Steel Company."

The Clerk of Court is directed to enter a revised judgment accordingly.

APPENDIX B

CHAPTER 181B

Sec.

181B.01 Citation

181B.02 Definitions

181B.03 Pension refunding charge, vested benefits prior to pension benefits protection act

181B.04 Nonvested benefits prior to act

181B.05 Vested benefits under act

181B.06 Nonvested benefits under act

181B.07 Exceptions to pension funding requirements

181B.08 Notice of intention to cease operations

181B.09 Investigation by commissioner

181B.10 Determination of amount of benefits; agreements as to benefits

181B.11 Certification of amount available

181B.12 Purchase of prepaid deferred annuity

181B.13 Recovery of amounts due

181B.14 Acts constituting termination

181B.15 Rules and regulations

181B.16 Protection of funds from execution or process

181B.17 Effective date; effect of federal act in area

181B.01 CITATION. Sections 181B.01 to 181B.17 shall be known and may be cited as the "private pension benefits protection act".

181.02 DEFINITIONS. Subdivision 1. As used in sections 181B.01 to 181B.17, the following terms shall have the meanings given.

Subd. 2. "Employer" means any person, firm or corporation who employs 100 or more people at least one of whom is employed in this state at any time within one year prior to the date that it ceases to operate a place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 3. "Place of employment" means any location within this state at which an employer employs any employees at any time within one year prior to the date that the employer ceases to operate at such location or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 4. "Employee" means any person employed at the place of employment at any time within one year prior to the date when the employer ceases to operate the place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14. "Employee" also means any person who is not employed by the employer but who was formerly employed in this state, and is eligible or will be eligible without the earning of additional pension credits to receive a pension benefit from the employer's pension plan.

Subd. 5. "Commissioner" means the commissioner of labor and industry.

Subd. 6. "Ceases to operate a place of employment or a pension plan" means:

(a) The complete termination of operations at a place of employment, or

(b) A substantial reduction in the number of employees at a place of employment, or

(c) The termination or substantial reduction of pension plan operations or benefits for all or a portion of an employer's employees.

The term shall not mean any temporary cessation of operations or reduction of employees. Neither shall the

term mean any cessation of operations by a single employer who participates in a pension plan to which more than one employer makes contributions if such cessation does not also entail the termination of the master pension plan. In determining whether any reduction has been substantial the commissioner shall take into consideration not only the absolute size of the reduction but the relative size of the reduction as it relates to the corporate and employment history of the group or subgroup suffering the reduction. In addition, the commissioner may find that a number of unsubstantial reductions are, for the purposes of sections 181B.01 to 181B.17, equivalent to a substantial reduction. When an employer ceases to operate a place of employment or a pension plan but offers to retain without loss of pension credit all of the employees in comparable jobs with equal or increased compensation at another location within the state or at some other location outside this state as specified in any voluntary agreement authorized by section 181B.10, sections 181B.01 to 181B.17 shall not apply except as it affects persons not employed by the employer but who are eligible or will be eligible without the earning of additional pension credits to receive the pension benefits from the employer's pension plan.

Subd. 7. "Pension plan" means any plan, fund or program which is established, maintained or entered into by an employer for the purpose of providing retirement benefits for its employees, or their beneficiaries and which is designated as a qualified pension plan under section 401 of the United States Internal Revenue Code of 1954 as amended, but does not mean any plan established by colective bargaining agreement which is excluded from the coverage of 29 U.S.C. 186(c) (5) (B) by 29 U.S.C. 186(g) and for which the employer has no administrative responsibility and no responsibility for the establishment of the retirement benefit schedule. Sections 181B.01 to 181B.17 shall not apply to any retirement fund or program providing benefits only for public employees of the federal government or the state government or a subdivision of

the state, nor shall it apply to any pension plan established on behalf of a religious, charitable, or educational organization as defined by Section 501(c) (3) of the United States Internal Revenue Code of 1954 as amended. Further, sections 181B.01 to 181B.17 shall not apply to any money purchase, profit sharing, or stock bonus plan in which no definitely determinable level or benefits is stipulated to be given to qualified plan participants at normal retirement age or some other age.

Subd. 8. "Normal retirement benefit" means that benefit payable under a pension plan in the event of retirement at the normal retirement age.

Subd. 9. "Normal retirement age" means the lesser of either the normal retirement age as prescribed by the pension plan or age 65.

Subd. 10. "Accrued portion of the normal retirement benefit" with respect to employees of ten or more years of covered service means the larger of either the present value of the pension benefit which the employee has earned prior to cessation under the terms of the pension plan itself or the present value of the normal retirement benefit to which the employee would be entitled under the plan as in effect on the date of the cessation if he continued to earn pension credits based on the covered service he would have accumulated had he continued as a plan participant until normal retirement age or if he continued to earn annually until normal retirement age the same rate of compensation as that which he had been earning prior to cessation, upon which his pension credit would have been computed under the plan at the rate specified by the plan for the years subsequent to the cessation, multiplied by a fraction not to exceed one, the numerator of which is the total number of his years of covered service as of the date of cessation, and the denominator plan as of normal retirement age if he had continued to be an active participant in the plan until attaining such age.

With respect to employees with less than ten years of covered service, the defining term means the present value

of the total amount of pension benefits which have been vested on or prior to the date of cessation. Where the above formulas are inapplicable or inequitable the defined term means that portion of the normal retirement benefit to which the commissioner determines actuarially the employee should be entitled based on the covered service of the employee, as of the date of the cessation.

Subd. 11. "Covered service" means the longer of either:

(a) The period of employment with an employer including predecessor employers as allowed in section 181B.07, clause (1) which is recognized under the terms of the employer's pension plan for the purposes of determining either an employee's eligibility to receive benefits under the plan or the amount of such benefits, or

(b) The amount of time after institution of the present pension plan or any substantially similar predecessor plan that an employee has been continuously employed in a full time capacity by an employer including predecessor employers as allowed in Section 181B.07, clause (1) prior to the cessation of operations. Temporary and seasonal layoffs and unpaid vacations and leaves of absence need not be credited as covered service but neither shall they serve to interrupt an employee's continuity of service. Part time employment may be credited as covered service if the commissioner determines that a previous full time employee has been reduced to part time status as part of a plan to evade provisions of sections 181B.01 to 181B.17.

Subd. 12. "Vested right" means a legal right obtained by an employee participating in a pension plan to that part of an immediate or deferred pension benefit which arises from the employee's covered service under the plan and is no longer contingent on the employee remaining covered under the plan.

Subd. 13. "Vested pension benefit" means that accrued portion of the normal retirement benefit of an employee participating, or who has participated, in a pension plan to which the employee has a vested right.

Subd. 14. "Nonvested pension benefit" means the accrued portion of the normal retirement benefit of an employee participating in a pension plan to which the employee does not have a vested right.

Subd. 15. "Present value of the total amount of nonvested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the nonvested pension benefit on the date on which the plan participant reached normal retirement age.

Subd. 16. "Present value of the total amount of vested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the vested pension benefit on the date on which the plan participant reached normal retirement age minus that sum of money which is set aside in trust or exclusively reserved to finance pension benefits for plan participants.

Subd. 17. "Present value of the normal retirement benefit" means that sum of money which is earning interest in a secure investment from the date of the cessation of operations onward would equal the value of the normal retirement benefit on the date on which the plan participant reached normal retirement age.

181B.03 PENSION REFUNDING CHARGE, VESTED BENEFITS PRIOR TO PENSION BENEFITS PROTECTION ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of

any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.04 NONVESTED BENEFITS PRIOR TO ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by section 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.05 VESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring after April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.06 NONVESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon covered service occurring after April 10, 1974, of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.07 EXCEPTIONS TO PENSION FUNDING REQUIREMENTS. An employer shall not be liable for any pension funding charge under sections 181B.03 to 181B.06 when (1) the employer ceases to operate a place of employment or a pension plan as a result of merger, consolidation, or acquisition of assets, if the successor to the employer continues the pension plan of the employer or establishes a comparable pension plan which covers all previously covered employees of the employer with no reduction in credited covered service for purposes of sections 181B.01 to 181B.17 and no reduction in the value of the pension credits already earned by the employees; or (2) the employer ceasing to operate a place of employment or a pension plan has (a) in each of the five years prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended, or (b) in at least eight of the ten years immediately prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of

the United States Internal Revenue Code of 1954 as amended, or (c) when the pension plan has been instituted less than five years prior to cessation, in every year since the institution of the plan, made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended.

181B.08 NOTICE OF INTENTION TO CEASE OPERATIONS. Any employer who intends to cease to operate a place of employment or a pension plan within this state shall notify the commissioner of such intention not later than six months prior to the date the employer intends to cease such operation. In the case of an employer who intends to cease to operate a place of employ ment or a pension plan within this state within six months of April 10, 1974, the notice required by this section shall be given by the employer as soon as practicable, but not later than ten days after April 10, 1974.

181B.09 INVESTIGATION BY COMMISSIONER. Upon receipt of such notification, or upon his own initiative when such notification is not given as required, the commissioner shall cause an investigation to be made of the employer to determine the number of employees who have completed ten or more years of covered service under the pension plan of the employer and whose nonvested or vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the amounts of such nonvested or vested pension benefits, if any, of such employees and the pension plan for such employees as may be necessary or useful to the commissioner to carry out his duties and responsibilities under sections 181B.01 to 181B.17. The investigation, insofar as practicable, shall be conducted at the employer's place of business during normal business hours. The employer

shall cooperate fully with the commissioner in such investigation, and shall make available to him any books, records or other information necessary or useful to such investigation. To aid in such investigations, the commissioner is authorized to administer oaths and affirmations and to issue subpoenas to compel the attendance of witnesses or the production of books, records or other documents. The commissioner may seek, through the attorney general acting on his behalf, orders from any court of competent jurisdiction to compel an employer to comply with the provisions of sections 181B.01 to 181B.17 and to punish disobedience of any subpoena issued pursuant to sections 181B.01 to 181B.17.

181B.10 DETERMINATION OF AMOUNT OF BENEFITS; AGREEMENTS AS TO BENEFITS. As part of the investigation of an employer, the commissioner shall determine the amount of nonvested and vested pension benefits which have been compromised or settled to his satisfaction. Nonvested and vested pension benefits may be compromised or settled by voluntary agreement between the employer and individual employees which is mutually understood by both parties to be a complete and final satisfaction of the employer's obligations regarding such benefits, provided that both parties are made fully aware of their rights and obligations under section 181B.01 to 181B.17 prior to the making of such voluntary agreement. Before any such settlement can be made it must be approved by the commissioner. The commissioner shall not approve any settlement that is not fair and equitable. Further, for all settlements entered into by the employer the relationship between the present value of the compromised pension credits and the value of the settlement must be as constant as is practicable.

181B.11 CERTIFICATION OF AMOUNTS AVAILABLE. After the investigation of the employer the commissioner shall certify to the employer the present value of the total amount of nonvested and vested pension benefits which are includable in determining an employer's pension funding charge liability under sections 181B.01 to 181B.17 and the amount of such benefits which have

been compromised or settled to the satisfaction of the commissioner. When the assets of an employer available for distribution under sections 181B.01 to 181B.17 are less than the sum total of the pension funding charges owed to employees as calculated by the commissioner, the commissioner shall calculate the proportion of available assets owed to each employee so that the actual amount to be received by any covered employee at normal retirement age divided by the amount that employee would have received at normal retirement age had there been no shortage of assets available for distribution under sections 181B.01 to 181B.17 is a ratio as constant as is possible from employee to employee. In seeking to keep such ratio constant the commissioner shall consider the amounts to be received by an employee from trust fund assets set aside for employee pension benefits but unavailable for distribution under section 181B.01 to 181B.17. The amount certified by the commissioner shall be due and payable to the employees in the manner specified in section 181B.12 on the date that the employer ceases to operate its place of employment or a pension plan and shall be a lien upon the employer's assets. If the pension funding charge is not paid when due, the employer shall be liable for interest on the amount due at the rate of eight percent per annum until the charge and interest are paid, and the attorney general of this state shall bring action in an appropriate district court of this state or in the courts of another state or in an appropriate federal court as provided for in section 181B.13.

181B.12 PURCHASE OF PREPAID DEFERRED ANNUITY. The amount certified by the commissioner as due and payable to the employees shall be paid to the employees by the employer through the purchase of a prepaid deferred annuity payable to the employee when he reaches normal retirement age or to his beneficiary upon the employee's death. Such purchase shall be made through a trust authorized by the United States Internal Revenue Service to make such purchases in a manner which exempts from federal income taxation the money used to purchase the annuity and all income earned by such annuity up to

the date of the distribution of the annuity amount. In no event shall the amount of annuity to be distributed at normal retirement age exceed the amount of the accrued normal retirement benefit.

181B.13 RECOVERY OF AMOUNTS DUE. The commissioner shall maintain a separate record of each employee owed a pension funding charge under section 181B.01 to 181B.17. Ten days after any pension funding charge is due the commissioner shall tabulate all unpaid amounts and certify that figure to the attorney general who shall immediately take appropriate legal action as authorized in section 181B.11 on behalf of all aggrieved employees in a class action suit.

181B.14 ACTS CONSTITUTING TERMINATION. For the purposes of sections 181B.01 to 181B.17, the employment of any employee involuntarily terminated within one year of the date an employer ceases to operate a place of employment or a pension plan within this state, or within such longer period as prescribed by the commissioner when he determines that an employer is attempting to evade the provisions of sections 181B.01 to 181B.17, shall be deemed to have been terminated because of the employer's ceasing to operate its place of employment or a pension plan, unless the employer can conclusively show that the termination was attributable to some other cause.

181B.15 RULES AND REGULATIONS. The commissioner may promulgate rules and regulations to provide for the efficient administration of the provisions of sections 181B.01 to 181B.17, or to clarify such provisions as may be necessary to effectuate the purposes of sections 181B.01 to 181B.17, and may from time to time specify any appropriate actuarial assumptions necessary to effectuate the purposes of sections 181B.01 to 181B.17.

181B.16 PROTECTION OF FUNDS FROM EXECUTION OR PROCESS. The funds of any employer which are set aside or reserved for benefits under a pension plan of the employer to which employees have a vested right shall not be liable to levy or attachment by virtue

of any execution or civil process whatever, issued out of any court of this state, for the collection of the pension funding charge imposed by sections 181B.01 to 181B.17.

181B.17 EFFECTIVE DATE: EFFECT OF FEDERAL ACT IN AREA. Sections 181B.01 to 181B.17 shall take effect the day following final passage. Provided that sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States.

APPENDIX C

NOTICE OF APPEAL

(CAPTION OMITTED IN PRINTING)

(FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION, ON SEPTEMBER 28, 1977)

TO: DEFENDANTS AND THEIR ATTORNEY, KENT G. HARBISON, SPECIAL ASSISTANT ATTORNEY GENERAL, 515 Transportation Building, St. Paul, Minnesota 55155

Notice is hereby given that Walter J. Fleck, Edythe A. Hamler, E. A. Richert, and Allied Structural Steel Company, the plaintiffs above named, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the final judgment entered in this action on September 2, 1977, and the revised final judgment entered on September 22, 1977.

/s/ JOHN R. KENEFICH
John R. Kenefich
W-2200 First National Bank Bldg.
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(612) 291-1215
Attorney for Plaintiff

Dated: September 27, 1977

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

Supreme Court, U. S.
FILED
FEB 28 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK ET AL.,

Appellants,

vs.

WARREN SPANNAUS ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DOCKETED NOVEMBER 25, 1977
PROBABLE JURISDICTION NOTED JANUARY 23, 1978

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INDEX TO APPENDIX

		PAGE
1.	Complaint	A-1
2.	Separate Answer of Defendants Warren Spannaus, E. I. Malone, and Phyllis Spielman	A-25
3.	Amended Complaint	A-30
4.	Amended Separate Answer of Defendants Warren Spannaus, E. I. Malone, and Phyllis Spielman	A-32
5.	Stipulation of Facts	A-38
6.	Memorandum Order	A-56
7.	Order Appointing Master	A-63
8.	Certification Order	A-65
9.	Memorandum Opinion	A-67
10.	Order	A-86
11.	Judgment	A-87
12.	Notice of Appeal to the United States Supreme Court	A-89
13.	Minnesota Statutes 1974, Chapter 181B	A-90

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Will
No. 74C 3532
THREE JUDGE COURT REQUESTED

WALTER J. FLECK, EDYTHE A. HAMLER, E. A. RICHERT, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and ALLIED STRUCTURAL STEEL COMPANY, a Delaware corporation,

Plaintiffs,

vs.

WARREN SPANNAUS, E. I. MALONE, PHYLLIS SPEILMAN and ALLIED STRUCTURAL STEEL COMPANY SALARIED EMPLOYEES' PENSION PLAN,

Defendants.

COMPLAINT

Now come WALTER J. FLECK, EDYTHE A. HAMLER, E. A. RICHERT, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and ALLIED STRUCTURAL STEEL COMPANY, a Delaware corporation, by their attorneys, MAURICE J. McCARTHY and DENNIS J. CARLIN, and complain of WARREN SPANNAUS, E. I. MALONE, PHYLLIS SPEILMAN and ALLIED STRUCTURAL STEEL COMPANY SALARIED EMPLOYEES' PENSION PLAN as follows:

COUNT I

1. Plaintiff Walter J. Fleck is a citizen and resident of the State of Illinois.

2. Plaintiff Fleck is informed and believes and so states as follows. Warren Spannaus is a citizen and resident of the State of Minnesota and is the Attorney General of said State. E. I. Malone is a citizen and resident of the State of Minnesota and is the Commissioner of the Department of Labor and Industry of said state. Phyllis Speilman is a citizen and resident of the State of Minnesota and is the Administrator of the Private Pension Benefits Protection Act of said State. Allied Structural Steel Company Salaried Employees' Pension Plan (hereinafter the "Pension Plan") is an entity which was organized on August 7, 1963 and which has existed continuously since that date. Said Pension Plan is administered in the State of Illinois within the boundaries of the United States District Court, Northern District, Eastern Division. Said Pension Plan uses as its depository the Northern Trust Company, a state bank in Chicago, Illinois, which is also the Pension Plan Trustee.

3. The jurisdiction of this Court is invoked pursuant to the provisions of Section 502 of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), Title 29 United States Code, Section 1132.

4. Plaintiff Walter J. Fleck was employed on a salaried basis by Allied Structural Steel Company (hereinafter referred to as "Allied") in July 1942 and has been employed continuously since that time. He has now attained the age of 50 years.

5. Allied is in the business of fabricating and erecting structural steel, both for intrastate and for interstate commerce. On or about August 7, 1963 Allied instituted a Pension Plan for the benefit of its salaried employees. That Plan is a qualified plan, under Section 401 of the Internal Revenue Code of 1954 and the regulations pertaining thereto.

6. Under the provisions of the Pension Plan, a salaried employee is entitled to full vesting and may elect early retirement if he is less than 55 years of age, after 25 or more years of continuous service, provided the sum of his age and years of continuous service equals 80 years. There are certain circumstances under which the age and service requirements may be varied. Attached as Exhibit "A" is a copy of the relevant Article of the Pension Plan. Treasury Regulation 1.401-6(b)(2) promulgated by the Internal Revenue Service provides additional "vesting" provisions in the event that there is either a partial or complete termination of the Plan by the plan sponsor. The aforesaid Internal Revenue Service Regulation provides for vesting "to the extent then funded".

7. Plaintiff Fleck, since he has been employed by Allied for thirty-two (32) years and has attained the age of fifty (50) years, is entitled under the terms of the Pension Plan to a "fully vested" interest therein and may elect early retirement. Plaintiff Fleck has not taken retirement, and thereby continues to be a participant and potentially entitled to the benefits of the Pension Plan.

8. For many years Allied has maintained a division office within the State of Minnesota. That office is engaged in the erection of steel structures, such as bridges, in 30 states as well as in the State of Minnesota. Allied has commenced the termination of that division office in Minnesota and accordingly on July 31, 1974, discharged eleven (11) employees of its thirty (30) total salaried employees in Minnesota. Two employees have terminated employment in the interim, and Seventeen (17) salaried employees in Minnesota remain in the employ of Allied, subject to the provisions of the Pension Plan, the provisions of ERISA and the provisions of the In-

ternal Revenue Code and Regulations which relate to said Pension Plan.

Some of the persons who were originally hired for the Minnesota office did work principally within the territorial limits of Minnesota. Most of the salaried employees, however, performed their duties either completely or substantially completely outside of Minnesota, even though they may have originally been hired by the Minnesota office. On several occasions salaried employees who had been hired by the Minnesota office and salaried employees from other Allied offices worked side-by-side at steel erection projects outside of Minnesota.

9. On September 2, 1974 Public Law 93-406 (ERISA) was enacted. That law is a Statute of the United States which provides a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits. Section 4062 of ERISA imposes a liability on the employer for:

"(b) . . . an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this title on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section." Title 29 United States Code, Section 1362(b).

10. ERISA provides equal treatment for all employees regardless of their state of residence or employment. The State of Minnesota, however, has enacted a law (the "Private Pension Benefits Protection Act", hereinafter referred to as "Minnesota Act") relating only to employees who are "employed at" a "place of employment" within the State of Minnesota. Attached as Exhibit "B" is a copy of Section 3, Section 4, Section 5, Section 6, Section 11 and Section 12, Chapter 437 of the Minnesota Statutes. There is no definition in the Act of the term "employed at the place of employment" within the State of Minnesota. In essence, that Statute provides that a terminated employee, employed at a place of employment in Minnesota, who has been an employee for ten years prior to termination is entitled to a pension based upon the present value of the pension he would have been entitled to receive at his normal retirement date had he been fully vested in said benefit on date of termination of employment. There is no "age" requirement for vesting, nor is there any limitation based on either the "funded amount" or on the "net worth" of the employer. The Minnesota Act is vague, indefinite and uncertain, especially in the following particular. It is impossible to determine whether the Minnesota Act is intended to bestow benefits only upon Minnesota residents, or upon persons physically performing work within Minnesota (wherever they reside), or upon persons who were hired by or are carried on the payroll of a Minnesota office and perform services in other states. It is conceivable that the Minnesota Act may, by its terms, apply to an employee who has never set foot in the State of Minnesota. To Plaintiff's knowledge, no regulations, rulings or judicial interpretations have been rendered as to the Minnesota Act.

11. By the operation of the said Minnesota Act, former "Minnesota employees" of Allied are given a fully "vested" and fully "funded" benefit without regard to their ages, after only ten (10) years of service. To the extent that any such employee receives funds from the Pension Plan, to pay any part of that benefit, that Plan will be diminished and the interest of Plaintiff Fleck will be adversely affected. To the extent that any such employee receives funds from Allied, to pay any part of that benefit, Allied's ability to continue to contribute to the Pension Plan will be impaired, and the interest of Plaintiff Fleck will be adversely affected.

12. This Court could construe the Minnesota Act to mean that the entire "pension funding charge" (as defined in the Minnesota Act) is to be paid by the employer from its assets, without recourse to the Pension Plan, when the terminated Minnesota employee is not entitled to a "vested share" under the Pension Plan. In that eventuality, the ability of Allied to make future contributions to the Pension Plan will be greatly impaired, if not destroyed. Plaintiff Fleck would thus be deprived of the benefits to which he is or will be entitled under the Pension Plan. Further, if the result of the Minnesota Act is to force Allied out of business, Plaintiff Fleck would have no lien upon the assets of Allied. Thus, the Minnesota Act attempts to bestow a benefit upon employees who are "employed at" a "place of employment" within the State of Minnesota to the direct or indirect detriment of other employees.

13. The Minnesota Act is invalid and unenforceable for each and all of the following reasons:

(a) The Federal Statute (ERISA) has preempted the field.

(b) The Minnesota Act is an unreasonable regulation of Interstate Commerce in violation of Article I, Section 8 of the Constitution of the United States.

(c) The Minnesota Act impairs the obligations of an existing contract between Plaintiff Fleck and Defendant Pension Plan, in violation of Article I, Section 10 of the Constitution of the United States.

(d) The Minnesota Act deprives Plaintiff Fleck of his property without due process of law in violation of Amendment XIV, Section 1 of the Constitution of the United States.

(e) The Minnesota Act is substantially unfair to the participants and beneficiaries of the Pension Plan who are not covered by said Act.

(f) The Minnesota Act contains the following provision:

> "Sec. 17 Effective date; effect of federal act in area Sections 181b.01 to 181b.17 shall take effect the day following final passage. Provided that Sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States."

Upon the enactment of ERISA the Minnesota Act became null and void by its own terms.

14. Plaintiff Fleck is informed and believes and states as follows. Defendants Speilman, Malone and Spannaus have threatened to enforce the Minnesota Statute against the Pension Plan and against the assets of Allied. Any such action would be taken by the aforesaid Defendants as individuals, not as agents of the State of Minnesota, because of the invalidity of the Minnesota Statute.

WHEREFORE, Walter J. Fleck prays this Court for the following relief:

(a) A clarification of his rights to future benefits under the terms of the Allied Structural Steel Company Salaried Employees' Pension Plan;

(b) A temporary injunction during the pendency of this suit and a permanent injunction against Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan from enforcing, attempting to enforce, or threatening to enforce the Private Pension Benefits Protection Act of the State of Minnesota;

(c) The convening of a three-judge court pursuant to Title 29 United States Code, Section 2284;

(d) An award of attorney's fees and court costs;

(e) Such other relief as justice may require.

COUNT II

1. Plaintiff Edythe A. Hamler is a citizen and resident of the State of Indiana.

2-3. As and for paragraphs 2 and 3 of this Count, Plaintiff Hamler incorporates by reference and realleges paragraphs 2 and 3 of Count I.

4. Plaintiff Hamler was employed on a salaried basis by Allied in February, 1963 and has been so employed continuously since that time.

5-6. As and for paragraphs 5 and 6 of this Count, Plaintiff Hamler incorporates by reference and realleges paragraphs 5 and 6 of Count I.

7. Plaintiff Hamler has been employed by Allied for more than eleven (11) years. She is not entitled to seek early retirement under the Pension Plan, but is presently a participant thereof.

8-14. As and for paragraphs 8 through 14 inclusive of this Count, Plaintiff Hamler incorporates by reference and realleges paragraphs 8 through 14 inclusive of Count I.

WHEREFORE, Edythe A. Hamler prays this Court for the following relief:

(a) A clarification of her rights to future benefits under the terms of the Allied Structural Steel Company Salaried Employees' Pension Plan;

(b) A declaration by this Court that the Private Pension Benefits Protection Act of Minnesota is void on the basis of vagueness, indefiniteness and uncertainty, or, in the alternative, that said Minnesota Act is invalid and unenforceable for the reasons stated above in paragraphs 13(a) through 13(e) inclusive.

(c) A temporary injunction during the pendency of this suit and a permanent injunction against Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan from enforcing, attempting to enforce, or threatening to enforce the Private Pension Benefits Protection Act of the State of Minnesota;

(d) The convening of a three-judge court pursuant to Title 28 United States Code, Section 2284;

(e) An award of attorneys' fees and court costs;

(f) Such other relief as justice may require.

COUNT III

1. E. A. Richert is a citizen and resident of the State of Illinois. He is presently acting as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan.

2-10. As and for paragraphs 2 through 10 inclusive of this Count, Plaintiff Richert incorporates by reference and realleges paragraphs 2 through 10 inclusive of Count I.

11. The Minnesota Act may require the application of the property of the Pension Plan to make payments to persons who are not entitled to such payments under the terms of said Pension Plan. There are many persons presently receiving payments from the Pension Plan. There are also several persons who are presently entitled to take retirement and receive payments from the Pension Plan (such as Walter J. Fleck). If Plaintiff Richert is required to make any payments to such of the thirteen (13) terminated Minnesota employees who may claim an interest under the Minnesota Act, then there will and must be a substantial diminution in the amounts available for the aforesaid beneficiaries and participants.

12. Plaintiff Richert is informed and believes and so states, that on September 12, 1974 Allied filed with the Secretary of the United States Department of Labor a protective claim for plan termination benefits under Sec. 4082(b) of ERISA in the event that a determination is made that a partial termination under the Internal Revenue Code of 1954 or under ERISA has taken place. Under the provisions of Sec. 4082(b) aforesaid, the filing of a timely claim renders applicable the mandatory insurance provisions to plans "terminated" after June 30, 1974 and before September 2, 1974, the date of enactment of ERISA. This provision extends retroactive coverage to June 30, 1974. No determination has been made on the aforesaid claim at the date of the filing of this Complaint. Pending such a determination, Plaintiff Richert needs the instruction of this Court as to the proper application of the assets of the Pension Plan in order to comply with the provisions of Section 409 of ERISA and to avoid any personal liability thereunder. Attached as Exhibit C is a copy of the claim aforesaid. Attached as Exhibit D is a copy of the receipt of the United States Department of Labor.

13. Section 11 of the Minnesota Act (see Exhibit "B") provides that the assets of the employer (Allied) are subject to a lien in favor of the terminated Minnesota employees. No such lien is provided in favor of continuing employees. Furthermore, the imposition of such a lien will deprive all other beneficiaries and participants of the Pension Plan of the future employer contributions, tax benefits, and eventual pension payments to which they are or may be entitled.

14. Under Section 409 of ERISA (Title 29 United States Code, Section 1109) Plaintiff Richert is a fiduciary who is responsible for the proper use of the assets of the Pension Plan and for the interests of beneficiaries and participants thereof. The use of the assets of the Pension Plan which may be contemplated by the Minnesota Act, together with the reduction in contributions which will result from the imposition of a lien on Allied's assets, is improper and impermissable.

15. The Minnesota Act is invalid for each and all of the following reasons:

(a) The Federal Statute (ERISA) has preempted the field.

(b) The Minnesota Act is an unreasonable regulation of Interstate Commerce in violation of Article I, Section 8 of the Constitution of the United States.

(c) The Minnesota Act impairs the obligations of an existing contract between Plaintiff Richert as Fiduciary of the Pension Plan and the salaried employees of Allied, in violation of Article I, Section 10 of the Constitution of the United States.

(d) The Minnesota Act deprives Plaintiff Richert as Fiduciary of the Pension Plan of property of the Pension Plan without due process of law in violation of Amendment XIV, Section 1 of the Constitution of the United States.

(e) The Minnesota Act contains the following provision:

"Sec. 17 Effective date; effect of federal act in area Sections 181B.01 to 181B.17 shall take effect the day following final passage. Provided that sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States."

Upon the enactment of ERISA the Minnesota Act became null and void by its own terms.

(f) The Minnesota Act is vague and indefinite and uncertain.

(g) The Minnesota Act is substantially unfair to the participants and beneficiaries of the Pension Plan who are not covered by said Act.

16. Plaintiff Richert is informed and believes and states as follows. Defendants Speilman, Malone and Spannaus have threatened to enforce the Minnesota Act against the Pension Plan and against the assets of Allied. Any such action would be taken by the aforesaid Defendants as individuals, not as agents of the State of Minnesota, because of the invalidity of the Minnesota Statute.

WHEREFORE, E. A. Richert, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, prays this Court for the following relief:

(a) A clarification of the duties and obligations imposed upon him as a fiduciary by ERISA as they relate to the administration of the terms of the Allied Structural Steel Company Salaried Employees' Pension Plan;

(b) A declaration by this Court that the Private Pension Benefits Protection Act of Minnesota is void, invalid and unenforceable for the reasons stated above in paragraphs 15(a) through 15(g) inclusive;

(c) A temporary injunction during the pendency of this suit and a permanent injunction against Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan from enforcing, attempting to enforce, or threatening to enforce the Private Pension Benefits Protection Act of the State of Minnesota;

(d) The convening of a three-judge court pursuant to Title 28 United States Code, Section 2284;

(e) Relief from the provisions of Section 409 of ERISA for actions taken pursuant to order of this Court;

(f) An award of attorneys' fees and court costs;

(g) Such other relief as justice may require.

COUNT IV

1. Allied Structural Steel Company is a Delaware corporation having its main office and place of business in the State of Indiana.

2-10. As and for paragraphs 2 through 10 inclusive of this Count, Plaintiff Allied incorporates by reference and realleges paragraphs 2 through 10 inclusive of Count I. Jurisdiction of this Court is also invoked under the theory of pendent or ancillary jurisdiction.

11-13. As and for paragraphs 11 through 13 inclusive of this Count, Plaintiff Allied incorporates by reference and realleges paragraphs 11 through 13 inclusive of Count III.

14. The Minnesota Act provides no notice of imposition and no means whereby Allied can obtain a hearing or otherwise defend itself against the imposition of a lien on its assets.

15. The Minnesota Act is a blatant attempt to prefer employees employed at its division office in Minnesota over all

creditors and stockholders of Allied and other similar employers.

16. The Minnesota Act, Section 12, requires an employer to purchase a prepaid deferred annuity for each qualifying terminated employee. Such a requirement is an unreasonable, arbitrary and capricious imposition which will seriously affect Allied's ability to continue in business and may force a complete termination of all operations.

17. The Minnesota Act is invalid for each and all of the following reasons:

(a) The Federal Statute (ERISA) has preempted the field.

(b) The Minnesota Act is an unreasonable regulation of Interstate Commerce in violation of Article I, Section 8 of the Constitution of the United States.

(c) The Minnesota Act impairs the obligations of an existing contract between Plaintiff Allied and its employees, in violation of Article I, Section 10 of the Constitution of the United States.

(d) The Minnesota Act deprives Plaintiff Allied of its property without due process of law in violation of Amendment XIV, Section 1 of the Constitution of the United States.

(e) The Minnesota Act contains the following provision:

> "Sec. 17 Effective date; effect of federal act in area Sections 181B.01 to 181B.17 shall take effect the day following final passage. Provided that sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States."

Upon the enactment of ERISA the Minnesota Act became null and void by its own terms.

(f) The Minnesota Act is vague and indefinite and uncertain.

(g) The Minnesota Act is substantially unfair to the participants and beneficiaries of the Pension Plan who are not covered by said Act.

(h) The Minnesota Act fails to provide notice to the person against whose assets a lien is to be imposed.

(i) The Minnesota Act fails to provide a hearing and an opportunity to defend against the imposition of a lien upon an employer's assets.

(j) The Minnesota Act does not apply to all employers, but only to those employers who have established a pension plan. Such a classification is unreasonable, arbitrary and invidious. The Minnesota Statute thereby violates Amendment XIV, Section 1 of the Constitution of the United States.

18. Plaintiff Allied is informed and believes and states as follows. Defendants Speilman, Malone and Spannaus have threatened to enforce the Minnesota Statute against the Pension Plan and against the assets of Allied. Any such action would be taken by the aforesaid Defendants as individuals, not as agents of the State of Minnesota, because of the invalidity of the Minnesota Act.

WHEREFORE, Plaintiff Allied Structural Steel Company, a Delaware corporation, prays this Court for the following relief:

(a) A clarification of the obligations under the terms of the Allied Structural Steel Company Salaried Employees' Pension Plan, ERISA, and the Internal Revenue Code of 1954 and Regulations;

(b) A declaration by this Court that the Private Pension Benefits Protection Act of Minnesota is void, invalid and unenforceable for the reasons stated above in paragraphs 17(a) through 17(j) inclusive.

(c) A temporary injunction during the pendency of this suit and a permanent injunction against Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan from enforcing, attempting to enforce, or threatening to enforce the Private Pension Benefits Protection Act of the State of Minnesota;

(d) The convening of a three-judge court pursuant to Title 28 United States Code, Section 2284;

(e) An amount of attorneys' fees and court costs;

(f) Such other relief as justice may require.

WALTER J. FLECK, EDYTHE A. HAMLER, E. A. RICHERT, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and ALLIED STRUCTURAL STEEL COMPANY, a Delaware corporation.

By: Maurice J. McCarthy
Dennis J. Carlin

208 South LaSalle Street
Chicago, Illinois 60604
263-4040 (312)
Of Counsel: Ettelson, O'Hagan,
Ehrlich & Frankel

[Affidavit of service omitted in printing]

EXHIBIT "A"

SECTION 3. ELIGIBILITY OF EMPLOYEES FOR PENSIONS.

1. After the effective date of this Plan, employees on retirement will be eligible for pensions as follows:

(1) An employee who retires on or after his normal retirement date will be entitled to a regular pension as provided in Section 5 of this Plan.

(2) An employee suffering from a total and permanent disability, as defined in Section 1 hereof, who on retirement has fifteen (15) years of continuous service, will be entitled to the following pensions:

(a) On retirement prior to his normal retirement date, the greater of:

(1) $100 per month, or

(2) A pension computed under Section 5 of this Plan but based on continuous service and average monthly earnings to date of retirement, whichever is greater.

(b) On attainment of his normal retirement date, a pension computed under sub-subparagraph (a)(2) of this paragraph.

(3) An employee who retires prior to his normal retirement date shall be entitled to an early retirement pension under the following conditions:

(a) If he retires after attaining the age of sixty (60) years, at his option, after fifteen (15) years of continuous service; or

(b) If he retires after having attained the age of fifty-five (55) years or older, after twenty (20) years of continuous service, or such other lesser number of years of continuous service which, added to his age equals the sum of seventy-five (75) years; or

(c) If he retires prior to the time he attains the age of fifty-five (55) years, after twenty-five (25) or more years of continuous service, provided that the sum of his age and years of continuous service equals eighty (80) years.

(e) If any employee becomes eligible for an early retirement pension under any subparagraph of this Section and after a break in continuous service again enters the employ of an employer, his right to such pension is vested and if, after the termination of such second period of his employment, his continuous service thereunder does not qualify him for a pension under any of the provisions of this Section because of the length of his continuous service prior to the second break in continuous service, he shall remain eligible for the pension to which he would have been entitled had he not resumed employment, and his retirement shall be presumed to commence after the time of his first break in continuous service.

(4) An employee eligible to receive an early retirement pension as provided in subparagraph (3) of paragraph 1 of this Section will be entitled, on retirement, to receive either of the following pensions he elects:

(a) A regular pension commencing at the time he attains the age of sixty-five (65); or

(b) A reduced early retirement pension at the time of retirement based on the regular pension to which he would have been entitled, reduced to its equivalent actuarial value at such time.

EXHIBIT "B"

Sec. 3 Pension refunding charge, vested benefits prior to pension benefits protection act

Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring before April 10, 1974, of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

Sec. 4 Nonvested benefits prior to act

Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

Sec. 5 Vested benefits under act

Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon

covered service occurring after April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

Sec. 6 Nonvested benefits under act

Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon covered service occurring after April 10, 1974, of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

Sec. 11 Certification of amounts available

After the investigation of the employer the commissioner shall certify to the employer the present value of the total amount of nonvested and vested pension benefits which are includable in determining an employer's pension funding charge liability under sections 181B.01 to 181B.17 and the amount of such benefits which have been compromised or settled to the satisfaction of the commissioner. When the assets

of an employer available for distribution under sections 181B.01 to 181B.17 are less than the sum total of the pension funding charges owed to employees as calculated by the commissioner, the commissioner shall calculate the proportion of available assets owed to each employee so that the actual amount to be received by any covered employee at normal retirement age divided by the amount that employee would have received at normal retirement age had there been no shortage of assets available for distribution under this act is a ratio as constant as is possible from employee to employee. In seeking to keep such ratio constant the commissioner shall consider the amounts to be received by an employee from trust fund assets set aside for employee pension benefits but unavailable for distribution under sections 181B.01 to 181B.17. The amount certified by the commissioner shall be due and payable to the employees in the manner specified in section 181B.12 on the date that the employer ceases to operate its place of employment or a pension plan and shall be a lien upon the employer's assets. If the pension funding charge is not paid when due, the employer shall be liable for interest on the amount due at the rate of eight percent per annum until the charge and interest are paid, and the attorney general of this state shall bring action in an appropriate district court of this state or in the courts of another state or in an appropriate federal court as provided for in section 181B.13.

Sec. 12 Purchase of prepaid deferred annuity

The amount certified by the commissioner as due and payable to the employees shall be paid to the employees by the employer through the purchase of a prepaid deferred annuity payable to the employee when he reaches normal retirement age or to his beneficiary upon the employee's death. Such purchase shall be made through a trust authorized by the United

States Internal Revenue Service to make such purchases in a manner which exempts from Federal income taxation the money used to purchase the annuity and all income earned by such annuity up to the date of the distribution of the annuity amount. In no event shall the amount of annuity to be distributed at normal retirement age exceed the amount of the accrued normal retirement benefit.

EXHIBIT "C"

MARTIN E. SEGAL COMPANY
Consultants and Actuaries
1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036
(202) 872-1870

September 12, 1974

Mr. Peter J. Brennan, Secretary
The Department of Labor
Room 3311
14th and Constitution Avenue, N. W.
Washington, D.C. 20210

Re: Notice of Eligibility for Coverage under Section 4082(b) of the Employee Retirement Income Security Act of 1974

Dear Mr. Secretary:

On behalf of the Allied Structural Steel Company, and in accordance with Section 4082(b) of the Employee Retirement Income Security Act of 1974 (the "Act"), we hereby give you notice that The Allied Structural Steel Company Salaried Employees Pension Plan (the "Plan") is eligible for plan termination insurance benefits as provided under the Act.

The following statements are made on behalf of the Allied Structural Steel Company:

1. The Plan is not a multi-employer plan.

2. On July 31, 1974, Allied Structural Steel Company commenced the termination of operations of a division known as the Industrial Construction Division, located in Minnesota. A substantial number of employees of the Division, who are participants of the Plan, were terminated on that date. It has not been determined at this time whether the discharge of the employees constitutes a partial termination of the Plan under the Internal Revenue Code of 1954 or under the Act. This Notice is filed prior to such determination because of the deadline for filing required under the Act.
3. The Plan is a plan to which Section 4021 of the Act would have applied if that section had been effective beginning July 1, 1974.

As required, the following information is supplied:

1. Plan Administrator—Mr. E. A. Richert, Allied Structural Steel Company, 1435 165th Street, Hammond, Indiana 46320. Telephone: (312) 374-1100.
2. Employer Identification Number of Allied Structural Steel Company—No. 36-2480943.
3. Employer Identification Number of Trust under the Plan —No. 36-6088363.
4. Department of Labor Number—WP 211181.

This Notice is filed by the Actuary representing the Plan on behalf of the Plan.

Sincerely,
MARTIN E. SEGAL COMPANY, INC.
By Shepard A. Sheinkman
Senior Vice President

SAS/mjm

cc: Dennis Carlin, Esq.
Ettelson, O'Hagan, Ehrich and Frankel
208 S. LaSalle Street, Suite 1000
Chicago, Illinois 60604
Mr. Wendell H. Link, Senior Vice President
The Martin E. Segal Company
230 North Michigan Avenue
Chicago, Illinois 60601

EXHIBIT "D"
U. S. DEPARTMENT OF LABOR
Office of the Assistant Secretary
Washington

Hand-delivered by Lillian M. Simet

On Sept. 12, 1974, I received a plan termination notice from the Allied Structural Steel Co. Salaried Employees Pension Plan (the "Plan")

It should be noted that under section 414(b)(3) of the Employee Retirement Income Security Act of 1974, the fiduciary responsibility provisions of Title I, subtitle B, part 4 of the Act are effective on the date of enactment (September 2, 1974) for any plan terminating after June 30, 1974, and before January 1, 1975, if the plan is one which is covered at the time of termination by section 4021 (plans covered by plan termination insurance) of the Act.

ROBERT B. LAGATHER
By Jean E. Chailler
Deputy Assistant Secretary
for Labor Management
Relations

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 74C-3532

(Title of Case Omitted in printing)

SEPARATE ANSWER OF DEFENDANTS
WARREN SPANNAUS, E. I. MALONE, AND
PHYLLIS SPEILMAN

Defendants Warren Spannaus, E. I. Malone, and Phyllis Speilman, for their separate answer herein, admit, deny, and allege as follows:

1. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Count I, paragraphs 1, 4, 5, and 7, Count II, paragraphs 1, 4, and 7, and Count III, paragraph 1 of the complaint.

2. As to Count I, paragraph 2, deny that defendant Speilman is the "Administrator of the Private Pension Benefits Protection Act of [Minnesota]"; affirmatively allege that defendant Speilman is the Administrator of the Pension Protection Division of the Minnesota Department of Labor and Industry; admit the remaining allegations contained in said paragraph concerning these separate answering defendants; as to the remaining allegations contained in said paragraph, these answering defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

3. Deny the jurisdictional allegation contained in Count I, paragraph 3, of the complaint.

4. To the extent that the allegations contained in Count I, paragraph 6, purport to explain provisions of the Pension

Plan, these defendants refer the Court to the text thereof; as to the allegations contained in said paragraph that purport to explain Treasury Regulation 1.4016(b)(2) promulgated by the Internal Revenue Service, these defendants refer the Court to the official text thereof.

5. As to Count I, paragraph 8, admit that "[f]or many years Allied has maintained a division office within the State of Minnesota" and that "Allied has commenced the termination of that division office in Minnesota"; allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

6. As to Count I, paragraph 9, admit that "[o]n September 2, 1974, Public Law 93-406 (ERISA) was enacted"; as to the remaining allegations contained in said paragraph, these defendants refer the Court to the official text of said statute.

7. As to Count I, paragraph 10, of the complaint, admit that the State of Minnesota has enacted a law entitled the Private Pension Benefits Protection Act (Minn. Laws 1974, Chapter 437, hereinafter referred to as the "Minnesota Act") and that no regulations, rulings, or judicial interpretations have been rendered as to said Act; specifically deny that said Act is vague, indefinite, and uncertain; as to the remaining allegations contained in said paragraph relating to the Minnesota Act or the federal Employee Retirement Income Security Act of 1974 (1974 Public Law 93-406, hereinafter referred to as "ERISA"), these defendants refer the Court to the official texts thereof.

8. To the extent that the allegations contained in Count I, paragraph 11, purport to explain the operation of the Minnesota Act, these defendants refer the Court to the official

text thereof; allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

9. To the extent that certain of the allegations contained in Count I, paragraph 12, set forth a hypothetical construction of the Minnesota Act, they raise issues of law not susceptible to responsive pleading; to the extent that the remaining allegations contained in said paragraph characterize the import and effect of said possible construction, allege that these defendants are without knowledge or information sufficient to form a belief as to their truth; specifically deny that "the Minnesota Act attempts to bestow a benefit upon employees who are 'employed at' a 'place of employment' within the State of Minnesota to the direct or indirect detriment of other employees."

10. To the extent that the allegations contained in Count I, paragraph 13, Count III, paragraph 15, and Count IV, paragraph 17, purport to set forth verbatim a section of the Minnesota Act, these defendants refer the Court to the official text thereof; deny the remaining allegations contained in said paragraph.

11. As to the allegations contained in Count I, paragraph 14, Count III, paragraph 16, and Count IV, paragraph 18, these defendants affirmatively allege that defendants Speilman and Malone have acted in their official capacities to carry out their statutory responsibilities under the Minnesota Act as it applies to the Pension Plan; deny the allegations contained in said paragraph in all other respects.

12. To the extent that the allegations contained in Count III, paragraph 11, set forth a hypothetical construction the Minnesota Act they are not susceptible to responsive pleading;

allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph.

13. To the extent that the allegations contained in Count III, paragraph 12, purport to set forth the requirements and effects of Sec. 4082(b) of ERISA, these defendants refer the Court to the official text thereof; deny that "Plaintiff Richert needs the instruction of this Court as to the proper application of the assets of the Pension Plan in order to comply with the provisions of Section 409 of ERISA and to avoid any personal liability thereunder"; allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

14. To the extent that the allegations contained in Count III, paragraph 13, purport to interpret provisions of the Minnesota Act, these defendants refer the Court to the official text thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

15. To the extent that the allegations contained in Count III, paragraph 14, purport to set forth the fiduciary responsibilities imposed by Section 409 of ERISA, these defendants refer the Court to the official text thereof; deny the remaining allegations contained in said paragraph.

16. Admit the allegations contained in Count IV, paragraph 1 of the complaint.

17. Deny the allegation contained in Count IV, paragraph 2-10, that "[j]urisdiction of this Court is also invoked under the theory of pendent or ancillary jurisdiction."

18. To the extent that the allegations contained in Count

IV, paragraphs 14, 15 and 16, purport to explain provisions of the Minnesota Act, these defendants refer the Court to the official text thereof; deny the remaining allegations contained in said paragraphs.

19. Specifically deny that the Minnesota Act is invalid, unconstitutional or unenforceable under any applicable doctrine of law.

20. Deny each and every other allegation, matter, fact, and thing not expressly admitted, denied, or qualified hereinabove.

SEPARATE DEFENSES

21. Allege that the Court lacks jurisdiction over the subject matter of this action.

22. Allege that the Court lacks jurisdiction over the persons of these separate answering defendants.

23. Allege that the complaint fails to state a claim upon which relief can be granted against these separate answering defendants.

24. Allege that this action is not ripe for adjudication.

25. Allege that as to any claims against these defendants venue in this Court is improper, or, in the alternative, the principle of *forum non conveniens* requires transfer of this action to the United States District Court for the District of Minnesota.

26. Allege that this Court should abstain from hearing this action.

WHEREFORE, these answering defendants pray that plaintiffs take nothing by their complaint, that plaintiffs' complaint be dismissed, and that these answering defendants be awarded their costs and disbursements herein.

Dated: January 2, 1975.

WARREN SPANNAUS
Attorney General
State of Minnesota
By PETER W. SIPKINS
Solicitor General
160 State Office Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961
Attorneys for Defendants
Warren Spannaus, E. I.
Malone, and Phyllis Speilman

[Affidavit of service omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CIVIL FILE NO. 3-75-178

(Title of Case Omitted in Printing)

AMENDED COMPLAINT

Plaintiffs, for their Amended Complaint, state and allege, as follows:

COUNT I

Plaintiffs reallege paragraphs 1 through 14 inclusive of the Complaint as though fully set forth herein.

15. As an additional basis for jurisdiction the matter in controversy exceeds the sum of $10,000 exclusive of interests and costs and arises under the Constitution and Laws of the United States. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

The prayer for relief is realleged as though fully set forth herein.

COUNT II

Plaintiffs reallege paragraphs 1 through 14 inclusive of the Complaint as though fully set forth herein.

15. As an additional basis for jurisdiction the matter in controversy exceeds the sum of $10,000 exclusive of interests and costs and arises under the Constitution and Laws of the United States. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

The prayer for relief is realleged as though fully set forth herein.

COUNT III

Plaintiffs reallege paragraphs 1 through 16 inclusive of the Complaint as though fully set forth herein.

17. As an additional basis for jurisdiction the matter in controversy exceeds the sum of $10,000 exclusive of interests and costs and arises under the Constitution and Laws of the United States. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

The prayer for relief is realleged as though fully set forth herein.

COUNT IV

Plaintiffs reallege paragraphs 1 through 18 inclusive of the Complaint as though fully set forth herein.

19. As an additional basis for jurisdiction the matter in controversy exceeds the sum of $10,000 exclusive of interests and costs and arises under the Constitution and Laws of the United States. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

The prayer for relief is realleged as though fully set forth herein.

BRIGGS AND MORGAN
By John R. Kenefick
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St. Paul, Minnesota 55101
291-1215
ETTELSON, O'HAGAN,
EHRLICH & FRANKEL
By Maurice J. McCarthy
Suite 1000
208 South LaSalle Street
Chicago, Illinois 60604
Attorneys for Plaintiffs

[Affidavit of service omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. Action No. 3-75-178

(Title of case omitted in printing)

AMENDED SEPARATE ANSWER OF
DEFENDANTS WARREN SPANNAUS,
E. I. MALONE, AND PHYLLIS SPEILMAN

Defendants Warren Spannaus, E. I. Malone, and Phyllis Speilman, for their amended separate answer herein, admit, deny, and allege as follows:

1. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Count I, paragraphs 1, 4, 5, and 7,

Count II, paragraphs 1, 4, and 7, and Count III, paragraph 1 of the amended complaint.

2. As to Count I, paragraph 2, deny that defendant Speilman is the "Administrator of the Private Pension Benefits Protection Act of [Minnesota]"; affirmatively allege that defendant Speilman is the Administrator of the Pension Protection Division of the Minnesota Department of Labor and Industry; admit the remaining allegations contained in said paragraph concerning these separate answering defendants; as to the remaining allegations contained in said paragraph, these answering defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

3. Deny the jurisdictional allegation contained in Count I, paragraph 3, of the amended complaint.

4. To the extent that the allegations contained in Count I, paragraph 6, purport to explain the provisions of the Pension Plan, these defendants refer the Court to the text thereof; as to the allegations contained in said paragraph that purport to explain Treasury Regulation 1.4016(b)(2) promulgated by the Internal Revenue Service, these defendants refer the Court to the official text thereof.

5. As to Count I, paragraph 8, admit that "[f]or many years Allied has maintained a division office within the State of Minnesota" and that "Allied has commenced the termination of that division office in Minnesota"; allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

6. As to Count I, paragraph 9, admit that "[o]n September 2, 1974, Public Law 93-406 (ERISA) was enacted"; as to the remaining allegations contained in said paragraph, these defendants refer the Court to the official text of said statute.

7. As to Count I, paragraph 10, of the amended complaint, admit that the State of Minnesota has enacted a law entitled the Private Pension Benefits Protection Act (Minn. Laws 1974, Chapter 437, hereinafter referred to as the "Minnesota Act") and that no regulations, rulings, or judicial interpretations have been rendered as to said Act; specifically deny that said Act is vague, indefinite, and uncertain; as to the remaining allegations contained in said paragraph relating to the Minnesota Act or the federal Employee Retirement Income Security Act of 1974 (1974 Public Law 93-406, hereinafter referred to as "ERISA"), these defendants refer the Court to the official texts thereof.

8. To the extent that the allegations contained in Count I, paragraph 11, purport to explain the operation of the Minnesota Act, these defendants refer the Court to the official text thereof; allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

9. To the extent that certain of the allegations contained in Count I, paragraph 12, set forth a hypothetical construction of the Minnesota Act, they raise issues of law not susceptible to responsive pleading; to the extent that the remaining allegations contained in said paragraph characterize the import and effect of said possible construction, allege that these defendants are without knowledge or information sufficient to form a belief as to their truth; specifically deny that "the Minnesota Act attempts to bestow a benefit upon employees who are 'employed at' a 'place of employment' within the State of Minnesota to the direct or indirect detriment of other employees."

10. To the extent that the allegations contained in Count I, paragraph 13, Count III, paragraph 15, and Count IV, paragraph 17, purport to set forth verbatim a section of the Minnesota Act, these defendants refer the Court to the official text thereof; deny the remaining allegations contained in said paragraph.

11. As to the allegations contained in Count I, paragraph 14, Count III, paragraph 16, and Count IV, paragraph 18, these defendants affirmatively allege that defendants Speilman and Malone have acted in their official capacities to carry out their statutory responsibilities under the Minnesota Act as it applied to the Pension Plan; deny the allegations contained in said paragraph in all other respects.

12. To the extent that the allegations contained in Count III, paragraph 11, set forth a hypothetical construction of the Minnesota Act they are not susceptible to responsive pleading; allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph.

13. To the extent that the allegations contained in Count III, paragraph 12, purport to set forth the requirements and effects of Sec. 4082(b) of ERISA, these defendants refer the Court to the official text thereof; admit that "on September 12, 1974 Allied filed with the Secretary of the United States Department of Labor a protective claim for plan termination benefits under Sec. 4082(b) of ERISA"; deny that "[n]o determination has been made on the aforesaid claim at the date of filing of" the amended complaint, and that "Plaintiff Richert needs the instruction of this Court as to the proper application of the assets of the Pension Plan in order to comply with the provisions of Section 409 of ERISA and to avoid any personal liability thereunder."

14. To the extent that the allegations contained in Count III, paragraph 13, purport to interpret provisions of the Min-

nesota Act, these defendants refer the Court to the official text thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

15. To the extent that the allegations contained in Count III, paragraph 14, purport to set forth the fiduciary responsibilities imposed by Section 409 of ERISA, these defendants refer the Court to the official text thereof; deny the remaining allegations contained in said paragraph.

16. Admit the allegations contained in Count IV, paragraph 1 of the amended complaint.

17. Deny the allegation contained in Count IV, paragraphs 2-10, that "[j]urisdiction of this Court is also invoked under the theory of pendent or ancillary jurisdiction."

18. To the extent that the allegations contained in Count IV, paragraphs 14, 15 and 16, purport to explain provisions of the Minnesota Act, these defendants refer the Court to the official text thereof; deny the remaining allegations contained in said paragraphs.

19. As to Count I, paragraph 15, Count II, paragraph 15, Count III, paragraph 17, and Count IV, paragraph 19, admit that the matter in controversy exceeds the sum of $10,000 exclusive of interests and costs; deny that jurisdiction is invoked pursuant to 28 U.S.C. § 1331; affirmatively allege that no substantial federal question is raised by the amended complaint.

20. Specifically deny that the Minnesota Act is invalid, unconstitutional or unenforceable under any applicable doctrine of law.

21. Deny each and every other allegation, matter, fact, and thing not expressly admitted, denied, or qualified hereinabove.

SEPARATE DEFENSES

22. Allege that the Court lacks jurisdiction over the subject matter of this action.

23. Allege that the Court lacks jurisdiction over the persons of these separate answering defendants.

24. Allege that the amended complaint fails to state a claim upon which relief can be granted against these separate answering defendants.

25. Allege that this Court should abstain from hearing this action.

WHEREFORE, these answering defendants pray that plaintiffs take nothing by their amended complaint, that plaintiffs' amended complaint be dismissed, and that these answering defendants be awarded their costs and disbursements herein.

Dated: December 15, 1975.

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD G. MARK
Assistant Solicitor General
By JAMES P. GERLACH
Special Assistant
Attorney General
And RICHARD S. SLOWES
Special Assistant
Attorney General
160 State Office Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961
Attorneys for Defendants
Warren Spannaus, E. I.
Malone, and Phyllis Speilman

[Affidavit of service omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-75 Civ. 178

(Title of case omitted in printing)

STIPULATION OF FACTS

The parties to the above-referenced case, through counsel, hereby stipulate that the facts hereinafter set forth are true; that all documents appended hereto are true and correct copies of their originals; and that the following statements of facts, together with all documents identified herein and appended hereto, may be relied upon by the Court in the determination of the legal issues raised by the pleadings. This stipulation is made by the parties to this proceeding upon and subject to the conditions that:

(a) all facts recited herein are stipulated by and between the parties for the purpose of this proceeding only and nothing contained herein shall constitute an admission by either party for any other purpose, action or proceeding;

(b) this stipulation to the truth and accuracy of the facts included herein and the documents appended hereto, does not constitute an admission by either party with respect to the relevancy or materiality of any such fact or document.

1. Plaintiff Walter J. Fleck is a citizen and resident of the State of Illinois.

2. Plaintiff Edyth A. Hamler is a citizen and resident of the State of Indiana.

3. Plaintiff E. A. Richert is a citizen and resident of the State of Illinois and is the Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan.

4. Plaintiff Allied Structural Steel Company ("Allied") is a Delaware corporation having its main office and place of business in the State of Illinois.

5. Defendant Warren Spannaus is a citizen and resident of the State of Minnesota and is the duly elected Attorney General of the State of Minnesota.

6. Defendant E. I. Malone is a citizen and resident of the State of Minnesota and is the Commissioner of the Minnesota Department of Labor and Industry.

7. Defendant Phyllis Spielman is a citizen and resident of the State of Minnesota and is the administrator of the Pension Protection Division of the Minnesota Department of Labor and Industry.

8. Defendant Allied Structural Steel Company Salaried Employees' Pension Plan ("Pension Plan") is an entity organized on August 7, 1963, and which has existed continuously since that date. It is a plan for the benefit of salaried employees. It is not a union plan and none of the participants are union employees. The Plan is administered within the State of Illinois. The Plan uses as its depository the Northern Trust Company, Chicago, Illinois. The Northern Trust Company is also the Pension Plan Trustee. Trust funds have continuously been in the possession of Northern Trust Company since August 7, 1963. All payments required by the Plan have been and will be made from the Trust Fund. The Pension Plan has been qualified as a single-employer Plan under Section 401 of the Internal Revenue Code of 1954, and regulations thereunder.

9. The matter in controversy exceeds the sum of $10,000 exclusive of interests and costs.

10. Allied is in the business of fabricating and erecting structural steel, both for intrastate and interstate commerce.

11. Under the provisions of the pension plan, a salaried employee is entitled to full vesting of his pension for early retirement purposes if: (1) he has worked fifteen continuous years and has attained the age of 60; or (2) after he has attained the age of 55 and has worked 20 continuous years, or a lesser number of continuous years of service, which when added to his age equals the sum of 75; or (3) before reaching age 55, he has at least 25 or more years of continuous service such that the sum of his age and continuous years of service equal 80. Attached as Exhibit "A" is a copy of the relevant Article of the Pension Plan. A copy of the entire Pension Plan will be submitted to the Court at oral argument.

12. Plaintiff Fleck has been continuously employed by Allied as a salaried employee for 32 years and is over age 50, and hence he is entitled to a "fully vested" interest under the Pension Plan and may take early retirement. He has not retired and is still a participant in the Pension Plan and is entitled to the benefits thereof.

13. Plaintiff Hamler was employed by Allied as a salaried employee for 13-1/2 years. She was not entitled to seek early retirement under the Pension Plan. She recently resigned from Allied, but until her resignation was a Plan participant.

14. For many years Allied maintained a division office within the State of Minnesota. The duty of this office was to oversee the erection and general construction of steel buildings and bridges located in at least 30 states.

15. At the present time these projects are managed from the main office which has been relocated from Hammond, Indiana to Chicago Heights, Illinois. The main offices of Allied, together with a fabricating facility, were moved due to an amalgamation that occurred on December 31, 1974.

16. In connection with the amalgamation, Allied began to terminate the division construction office in Minnesota in the summer of 1974. On July 31, 1974, Allied discharged eleven out of thirty salaried employees in Minnesota. Additional employees have terminated since that date for various reasons. The Minnesota office was finally closed in February, 1975.

17. On April 9, 1974, the Minnesota Legislature adopted a law entitled the Private Pension Benefits Protection Act. The Act became effective the following day. This Act is known as Minnesota Laws, 1974, Chapter 437, and is now codified as Chapter 181B of the Minnesota Statutes. No regulations, rulings, or final judicial interpretations have been rendered concerning this Act.

18. On September 2, 1974, Public Law 93-406 was enacted. The title of this Act is the Employees Retirement Income Security Act of 1974 ("ERISA").

19. On August 7, 1974, counsel for Allied notified the Minnesota Department of Labor and Industry of the intended termination of the Minnesota division and the fact that some employees had already been terminated. A copy of the notice is attached hereto as Exhibit "B".

20. Pursuant to their responsibilities under the Minnesota Pension Act, defendants Malone and Spielman conducted an investigation concerning the closing of Allied's Minnesota division and its effect on the terminated employees' pension benefits. By letter dated August 18, 1975, a copy of which is attached hereto as Exhibit "C", defendant Malone notified Allied of the assessment of a pension funding charge under the Act of approximately $185,000 and afforded Allied an opportunity to challenge said pension funding charge through an administrative hearing. On September 19, 1975, Allied requested a hearing under protest. A copy of Allied's Applica-

tion for Hearing is attached hereto as Exhibit "D". A hearing examiner was subsequently appointed, and by order issued on or about October 28, 1975, a copy of which is attached hereto as Exhibit "E", the hearing examiner stayed the administrative proceedings pending resolution by this Court of Allied's motion for preliminary injunction enjoining those proceedings.

21. No lien can attach nor any payment become due under the Minnesota Pension Act with respect to Allied until the administrative proceedings have been concluded and a final pension funding charge has been certified pursuant to Minn. Stat. § 181B.11 (1974).

WALTER J. FLECK,
EDYTH A. HAMLER,
E. A. RICHERT, as
Fiduciary of the Allied
Structural Steel Company
Salaried Employees' Pension
Plan, and
ALLIED STRUCTURAL
STEEL COMPANY, a
Delaware Corporation
By Maurice J. McCarthy
By John R. Kenefick
By James M. Hurley
MAURICE J. McCARTHY
55 East Monroe Street
Suite 4010
Chicago, Illinois 60603

JOHN R. KENEFICK
W-2200 First National
Bank Building
St. Paul, Minnesota 55101
(612) 291-1215
JAMES M. HURLEY
208 South LaSalle Street
Suite 1000
Chicago, Illinois 60604
(312) 263-4040
WARREN SPANNAUS,
E. I. MALONE,
PHYLLIS SPIELMAN and
ALLIED STRUCTURAL STEEL
COMPANY SALARIED
EMPLOYEES' PENSION PLAN
By WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
JAMES P. GERLACH
Special Assistant
Attorney General
RICHARD S. SLOWES
Special Assistant
Attorney General
160 State Office Building
St. Paul, Minn. 55155
Telephone: (612) 296-2961

EXHIBIT A

SECTION 3. ELIGIBILITY OF EMPLOYEES FOR PENSIONS.

1. After the effective date of this Plan, employees on retirement will be eligible for pensions as follows:

(1) An employee who retires on or after his normal retirement date will be entitled to a regular pension as provided in Section 5 of this Plan.

(2) An employee suffering from a total and permanent disability, as defined in Section 1 hereof, who on retirement has fifteen (15) years of continuous service, will be entitled to the following pensions:

(a) On retirement prior to his normal retirement date, the greater of:

(1) $100 per month, or

(2) A pension computed under Section 5 of this Plan but based on continuous service and average monthly earnings to date of retirement, whichever is greater.

(b) On attainment of his normal retirement date, a pension computed under sub-subparagraph (a)(2) of this paragraph.

(3) An employee who retires prior to his normal retirement date shall be entitled to an early retirement pension under the following conditions:

(a) If he retires after attaining the age of sixty (60) years, at his option, after fifteen (15) years of continuous service; or

(b) If he retires after having attained the age of fifty-five (55) years or older, after twenty (20) years of continuous service, or such other lesser number of years of continuous service which, added to his age equals the sum of seventy-five (75) years; or

(c) If he retires prior to the time he attains the age of fifty-five (55) years, after twenty-five (25) or more years of continuous service, provided that the sum of his age and years of continuous service equals eighty (80) years.

(e) If any employee becomes eligible for an early retirement pension under any subparagraph of this Section and after a break in continuous service again enters the employ of an employer, his right to such pension is vested and if, after the termination of such second period of his employment, his continuous service thereunder does not qualify him for a pension under any of the provisions of this Section because of the length of his continuous service prior to the second break in continuous service, he shall remain eligible for the pension to which he would have been entitled had he not resumed employment, and his retirement shall be presumed to commence after the time of his first break in continuous service.

(4) An employee eligible to receive an early retirement pension as provided in subparagraph (3) of paragraph 1 of this Section will be entitled, on retirement, to receive either of the following pensions he elects:

(a) A regular pension commencing at the time he attains the age of sixty-five (65); or

(b) A reduced early retirement pension at the time of retirement based on the regular pension to which he would have been entitled, reduced to its equivalent actuarial value at such time.

EXHIBIT B

LAW OFFICES
ETTELSON, O'HAGAN, EHRLICH & FRANKEL
208 South LaSalle Street
Chicago, Illinois 60604
(312) 263-4040

August 7, 1974

Mr. E. I. Malone, Commissioner
Department of Labor and Industry
444 Lafayette Road
St. Paul, Minnesota 55101

re: Minnesota Private Pension Benefits Protection Act

Dear Mr. Commissioner:

We are general counsel for Allied Structural Steel Company, located at 1435—165th Street, Hammond, Indiana 46320. Allied has operated a division in Minnesota known as the Industrial Construction Division, located at 9216 Grand Avenue South, Minneapolis, Minnesota 54420.

On behalf of Allied, we hereby notify you that Allied intends to terminate the operation of its division in Minnesota. Some of the employees of the division have been terminated and it is anticipated that the remainder of the employees will be terminated within a year to a year and one-half.

This notice is given pursuant to Section 181B.08 of the Minnesota Private Pension Benefits Protection Act. Further communications should be directed to Raymond T. Denten or the undersigned, at the above address or to Mr. C. Farnham Jarrard, Jr., President of Allied Structural Steel Company, at the Hammond, Indiana address, with a copy to the undersigned.

Sincerely,
Dennis J. Carlin

DJC/pbr
REGISTERED MAIL,
RETURN RECEIPT REQUESTED

EXHIBIT C

STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
Saint Paul 55101

August 18, 1975

Allied Structural Steel Company
1435 165th Street
Hammond, Indiana 46320

Attention: C. Farnham Jarrard, Jr., President

Dennis J. Carlin, Esq.
Ettelson, O'Hagen, Ehrlich & Frankel
Suite 1000
208 South LaSalle Street
Chicago, Illinois 60604

Gentlemen:

The State of Minnesota Department of Labor and Industry hereby notifies Allied Structural Steel Company of the assessment of a pension funding charge pursuant to the Minnesota Private Pension Benefits Protection Act, Minn. Stat. ch. 181B (1974) ("the Minnesota Pension Act").

By letter dated August 7, 1974, Allied Structural Steel Company notified the Department of Labor and Industry that it had commenced cessation of the operations of its Industrial Construction Division, 9216 Grand Avenue, Minneapolis, Minnesota 55402, on or about July 31, 1974. Subsequent to said notification, the Pension Division of the Department of Labor and Industry conducted an investigation to determine the respective liabilities and rights, under the Minnesota Pension Act, of Allied Structural Steel Company and its terminated employees who had been employed at a place of employment in Minnesota and who had participated in the Allied Structural Steel Company Salaried Employees Pension Plan.

The pertinent information acquired through that investigation is tabulated on the Addendum attached hereto. Based

on that information, the Pension Division has ascertained that under the provisions of the Minnesota Pension Act Allied Structural Steel Company owes a pension funding charge to the terminated employees listed. The pension funding charge is expressed in the Addendum as the sum of the present values of the accrued monthly retirement benefits[1] and the survivorship benefits[2] to which those employees and their surviving spouses, respectively, are entitled.

Pursuant to Minn. Stat. § 181B.12, the pension funding charge liability of Allied Structural Steel Company to the listed terminated employees is to be satisfied by the purchase of prepaid deferred annuities payable to each employee upon their reaching normal retirement age in an amount equal to the accrued monthly retirement benefit which that employee has earned and to each employee's surviving spouse in an amount equal to the survivorship benefit which the employee has earned.[3] The cost of the purchase of said annuities need not be equivalent to the pension funding charge indicated in

[1] "Accrued monthly retirement benefit" means the benefit payable to the employee (under the Allied Structural Steel Company Salaried Employees Pension Plan as in effect of the date of commencement of cessation of operation of the Industrial Construction Division, July 31, 1974) in the event of retirement at the normal retirement age (65), to which the employee would be entitled if he continued to earn annually until normal retirement age the same rate of compensation as that which he had been earning prior to cessation and upon which his pension credit would have been computed under the plan at the rate specified by the plan for the years subsequent to cessation, multiplied by a fraction not to exceed one, the numerator of which is the total number of his years of covered service as of the date of cessation, and the denominator of which is the total number of years he would have had in covered service in such plan as of normal retirement age if he had continued to be an active participant in the plan until attaining such age.

[2] "Survivorship benefit" means fifty percent (50%) of the accrued monthly retirement benefit, payable to the terminated employee's surviving spouse in the event of the employee's death after reaching normal retirement age.

[3] In no event shall the amount of annuity to be distributed at normal retirement age exceed the amount of the accrued monthly retirement benefit.

the Addendum. Such purchase shall be made through a trust authorized by the United States Internal Revenue Service to make such purchases in a manner which exempts from federal income taxation the money used to purchase the annuity and all income earned by such annuity up to the date of distribution of the annuity amount. Proof of such purchase shall be provided to the Pension Division within 72 hours thereof.

A hearing will be provided for the determination and resolution of any disputed issues concerning the assessed pension funding charge liability if a written Request for Hearing is served upon the Department of Labor and Industry within thirty (30) days of receipt of this letter. Such Request for Hearing shall include a short and plain statement of all issues on which a hearing is desired, the determination sought, and the grounds therefor. Issues which may be raised include, but are not limited to: objections to the assessed pension funding charge liability, manner and method of satisfaction of said liability, and determination of amounts settled or compromised. Within ten (10) days of receipt of a timely-served Request for Hearing, the Department of Labor and Industry shall appoint a hearing officer and commence contested case proceedings pursuant to Minn. Reg. Atty. Gen. 407, Rule 4.

Unless objection is made hereto in the manner specified above, the assessed pension funding charge liability shall be deemed certified pursuant to Minn. Stat. § 181B.11 and shall be due and payable in the manner heretofore described sixty (60) days from receipt of this notice. Pursuant to Minn. Stat. § 181B.11, if said liability is not satisifed within the time provided, interest thereon shall accrue from the date due at the rate of eight percent (8%) per annum until the liability and interest are paid.

DEPARTMENT OF LABOR AND INDUSTRY
E. I. MALONE
Commissioner

ADDENDUM

INDUSTRIAL CONSTRUCTION DIVISION OF ALLIED STRUCTURAL STEEL COMPANY

ACCRUED MONTHLY RETIREMENT BENEFITS AND PRESENT VALUES AS OF JULY 31, 1974

Terminated Employee	Monthly Salary (as of July 31, 1974)	Credited Service Years	Credited Service Months	Accrued Monthly Retirement Benefit	Present Value* Employee Retirement Benefit	Present Value* Surviving Spouse's Benefit
Dyer, Joseph E.	$1,518.65	19	4	$294	$ 9,937	$ 0
Everson, Merrill	1,750.00	12	3	214	9,369	0
Guenzler, Donald	2,369.54	17	—	403	10,067	1,616
Hennessey, John	2,048.33	14	3	292	12,784	2,472
Johnson, Ruby	542.89	13	10	75	3,036	87
Johnson, Harold	2,315.25	20	8	478	25,956	5,584
Keough, Virginia	1,066.16	24	11	266	14,541	429
Leschner, Harry	2,073.71	12	9	264	16,956	3,318
Martin, Carol	629.35	12	4	78	2,589	44
Sehlin, A. A. Jr.	3,461.50	21	—	727	25,859	3,914
Sehlin, David G.	2,994.25	14	2	424	10,591	1,592
Thery, Fredrick	1,000.00	13	9	138	4,433	852
Westgard, Paul D.	1,998.25	20	3	405	19,725	0
					$165,843	$ 19,908
						165,843
				PENSION FUNDING CHARGE		$185,751

* Basis: 1971 Group Annuity Table with 5% interest.

EXHIBIT D

STATE OF MINNESOTA

DEPARTMENT OF LABOR AND INDUSTRY

In Re: Allied Structural Steel

APPLICATION FOR HEARING, UNDER PROTEST

Comes now Allied Structural Steel, (hereinafter "applicant") and applies to the Department of Labor and Industry, State of Minnesota, under protest, for a contested case hearing pursuant to Minn. Reg. Atty. Gen. 406, Rule 3. In accordance with said rule, applicant states as follows:

1. The name and address of applicant is Allied Structural Steel, 2705 State Street, Chicago Heights, Illinois.

2. On August 18, 1975, the Minnesota Department of Labor and Industry notified applicant of the assessment of a pension funding charge pursuant to the Minnesota Private Pension Benefits Act, Minn. Stat. 1974, Chapter 181B. A copy of said letter is attached hereto as Exhibit A and made a part hereof by reference.

3. On December 17, 1974, applicant and others commenced an action against the Commissioner of Labor and Industry, and others, in the United States District Court for the Northern District of Illinois, Eastern Division, requesting a declaration that the Minnesota Private Pension Benefits Act is invalid on a number of grounds, including the following:

a. The Employees Retirement Income Security Act of 1974 (ERISA) has preempted the field;

b. The Minnesota Act is an unreasonable regulation of Interstate Commerce in violation of Article I, Section 8 of the Constitution of the United States;

c. The Minnesota Act impairs the obligations of an exist-

ing contract between applicant and its employees in violation of Article I, Section 10 of the United States Constitution;

d. The Minnesota Act deprives applicant of its property without due process of law in violation of Amendment XIV of the United States Constitution;

e. The Minnesota Act became inoperative by its own terms upon the passage of ERISA;

f. The Minnesota Act is vague and uncertain;

g. The Minnesota Act is substantially unfair to the participants and beneficiaries of Allied's Pension Plan who are not covered by the Minnesota Act;

h. The Minnesota Act fails to provide notice to the person against whose assets a lien is to be imposed;

i. The Minnesota Act does not provide a hearing and an opportunity to defend against the imposition of a lien upon an employer's assets;

j. In that the Minnesota Act does not apply to all employers, but only those who have established a pension plan, the Act is unreasonable and arbitrary in violation of Amendment XIV to the United States Constitution.

4. Said action was transferred on a venue ruling to the United States District Court, District of Minnesota, Third Division, on April 28, 1975, and is presently assigned to the Honorable Donald Alsop. Motions of applicant are pending before the court for summary judgment or for an injunction to restrain the Commissioner and others from enforcing the State Act against applicant.

5. Due to the short period (30 days) in which applicant has to request a hearing, and the fact that a full hearing on the motion for a temporary injunction has not yet occurred because of scheduling conflicts in the federal courts, applicant has been forced to file this Application under protest.

6. As grounds for a hearing, applicant states as follows:

a. The Department of Labor and Industry lacks jurisdiction to issue the assessment because of the pending federal court action.

b. As a matter of comity, the Department of Labor and Industry should refrain from any assessment procedures while the federal court action is pending.

c. In accordance with the pleadings and assertions made by applicant in the federal court action, and summarized in paragraph 3 herein, applicant has no liability to the terminated employees for a pension funding charge.

d. If any liability is present to the terminated employees, the schedule attached to the assessment notice, (Exhibit A) called the accrued monthly retirement benefits and present values as of July 31, 1974, is inaccurate, misleading and based on incorrect actuarial assumptions.

e. If any liability is present to the terminated employees, the manner and method of satisfaction of said liability is arbitrary, capricious and constitutes a taking of applicant's property without due process of law, in violation of federal and state constitutional provisions.

7. Other than the applicant, the names of persons affected by this determination are the terminated employees, listed on the Addendum or schedule to Exhibit A.

Dated: September 19, 1975.

JOHN R. KENEFICK
Attorney for Allied
Structural Steel
W-2200 First National
Bank Building
St. Paul, Minnesota 55101

State of Minnesota
County of Ramsey—ss.

John R. Kenefick, being first duly sworn, deposes and says that he has read the foregoing application and that the same is true of his own knowledge, information and belief.

SHARON FRANER
Notary Public

(Jurat)

EXHIBIT E
BEFORE THE DEPARTMENT OF
LABOR AND INDUSTRY

State of Minnesota
County of Ramsey

In the Matter of the Application of Allied Structural Steel Company for a Hearing to Determine its Rights and Liabilities under Minn. Stat. §181B.01-.17 (1974)

ORDER OF POSTPONEMENT OF PREHEARING CONFERENCE VACATING ORDER OF OCTOBER 15, 1975, AND CLARIFYING GROUNDS FOR POSTPONEMENT

WHEREAS, the undersigned has been appointed as hearing examiner to preside in the above-entitled matter and issued an order dated October 15, 1975, in said matter; and

WHEREAS, the Commissioner of the Department of Labor and Industry has requested reconsideration of that order and said request has been considered by the undersigned;

IT IS HEREBY ORDERED that the above-referenced order of October 15, 1975 is vacated; and

IT IS FURTHER ORDERED that the pre-hearing conference in this matter be and hereby is postponed only until such time as the federal court renders its decision on the pending motion by Allied Structural Steel Company to enjoin the administrative proceedings herein; and

IT IS FURTHER ORDERED that the counsel for the Commission of the Department of Labor and Industry, a defendant in said federal court action, shall serve upon the undersigned a copy of all orders and judgments issued by the federal court in said action at such time as said orders and decisions are issued; and

IT IS FURTHER ORDERED that appropriate notice shall be served on all the parties hereto as to the time and place of a pre-hearing conference in the above-captioned matter in the event these proceedings are not enjoined by the federal court.

S. B. FRIED
Hearing Examiner
7th Floor, American Center Building
160 East Kellogg Boulevard
St. Paul, Minnesota 55155

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-75 Civ. 178

WALTER J. FLECK, EDYTH A. HAMLER, E. A. RICHERT, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and ALLIED STRUCTURAL STEEL COMPANY, a Delaware corporation,

Plaintiffs,

vs.

WARREN SPANNAUS, E. I. MALONE, PHYLLIS SPEILMAN and ALLIED STRUCTURAL STEEL COMPANY SALARIED EMPLOYEES' PENSION PLAN,

Defendants.

MEMORANDUM ORDER

JOHN R. KENEFICK, Esq., Briggs and Morgan, St. Paul, Minnesota, together with MAURICE J. McCARTHY, Esq., Ettelson, O'Hagan, Ehrich & Frankel, Chicago, Illinois, appeared for the plaintiffs.

Warren Spannaus, Attorney General, State of Minnesota, by JAMES P. GERLACH, Esq., and RICHARD S. SLOWES, Esq., Special Assistant Attorneys General, appeared for the defendants.

CURTIS L. ROY, Esq., Dorsey, Windhorst, Hannaford, Whitney & Halladay, Minneapolis, Minnesota, together with FRANK C. HEATH, Esq., Jones, Day, Reavis & Pogue, Cleveland, Ohio, appeared Amici Curiae for White Motor Corporation and White Farm Equipment Company.

Before: HEANEY, Circuit Judge, and DEVITT and ALSOP, District Judges.

Plaintiffs have commenced the above-entitled action challenging the enforceability and constitutionality of the Minnesota Private Pension Benefits Protection Act, Minn. Stat. § 181B.01 *et seq.* (1974) (hereinafter the Pension Act). The relevant facts are set forth in *Fleck et al v. Spannaus et al.*, 412 F. Supp. 366 (D. Minn. 1976), where the court, sitting as a single judge, denied certain aspects of plaintiffs' motions and requested the convening of a three-judge court.

Presently before the three-judge court is plaintiffs' motion for summary judgment enjoining the enforcement of the Pension Act on the grounds that (1) it became null and void by its own terms when the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (hereinafter "ERISA") was enacted; and (2) it is in violation of numerous provisions of the United States Constitution. Defendants have moved for abstention in order to permit the Pension Act to be construed by the state court. Alternatively, defendants argue that the Pension Act is constitutional in all respects.

Prior to addressing the various motions, the court in the exercise of its inherent power is constrained to examine the existence of a justiciable controversy as it relates to the three individual plaintiffs, Fleck, Hamler and Richert. Article III, §2 of the Constitution limits the jurisdiction of the federal courts to cases or controversies. The standing of the plaintiffs to pursue their claims is an aspect of the case or controversy requirement. *Urban Contractors Alliance of St. Louis v. Bi-State Development Agency*, 531 F.2d 877, 881 (8th Cir. 1976).

The Eighth Circuit recently articulated its views on standing by stating:

The test of constitutional standing has been variously expressed as "real and immediate injury" to the plaintiff, *Rizzo v. Goode*, —— U.S. ——, 96 S.Ct. 598, 46 L.Ed.2d 561, 44 U.S.L.W. 4095, 4098 (1976), "a distinct and palpable injury to himself", *Warth v. Seldin, supra*, 422 U.S. at 501, 95 S.Ct. at 2206, or "injury in fact", *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). But under any articulation of the standard it is fundamental that the plaintiff himself must have suffered the injury he seeks to redress. For if the plaintiff has not "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions * * * ", *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L. Ed.2d 663 (1962), no "case or controversy" is presented. *Urban Contractors, supra*, 531 F.2d at 881.

The individual plaintiffs have challenged the enforceability and constitutionality of the Pension Act in Counts I-III of the amended complaint. Fleck and Hamler are salaried employees of the corporate plaintiff, Allied Structural Steel Company (hereinafter Allied). Richert is the Fiduciary of the Allied Structural Steel Company Salaried Employees Pension Plan (hereinafter the Pension Plan). However, the rights and obligations of the individual plaintiffs under the Pension Plan are not affected by the Pension Act. The Pension Act is addressed solely to the relationship between terminated employees and the employer and the relief which it seeks to provide can be asserted only against the employer. *See* Minn. Stat. §§ 181B.03 and .11. Thus it does not appear that any injury will inure to the individual plaintiffs and the court is compelled to conclude that such plaintiffs have not sufficiently alleged a "personal stake in the outcome" to meet the constitutional standing requirements. Accordingly, the claims of Fleck, Hamler and Richert, as contained in Counts I-III of the amended complaint will be dismissed.

Plaintiffs have moved for summary judgment on the grounds that the Pension Act by its own terms has self-destructed. Minn. Stat. § 181B.17 provides in relevant part:

> ". . . [S]ections 181B.01 to 181B.17 [the Minnesota Pension Act] shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States.

It is unclear precisely when the conditions set forth in the so-called "null and void provision" were or will be satisfied. ERISA contains a subchapter covering termination insurance, 29 U.S.C. § 1301 *et seq.*, which became effective on September 2, 1974. 29 U.S.C. § 1381. However, ERISA's vesting provisions for plans in existence on January 1, 1974 did not become effective until after December 31, 1975. 29 U.S.C. § 1601(b)(2).

In addition to the question of the duration of the Pension Act, it is also unclear what happens to any rights which have accrued or any proceedings—administrative or judicial—which may have been instituted. No savings clause is contained in the Pension Act and no precise statutory rule of construction exists to aid in the construction of the null and void provision. *See* Minn. Stat. ch. 645 (1974). The Attorney General argues that the self-destruct language in the null and void provision is analagous to the repeal of a law and that accrued and existing actions should be preserved as in the case of repeal. *See* Minn. Stat. § 645.35.

Faced with these uncertainties of state law, it is difficult for this court to forecast how the null and void provision might be interpreted by the state courts. More importantly, depending on the interpretation given to such provision, it is entirely possible that this court need not address the constitutional questions raised herein[1] and thus comport with the well established federal policy of avoiding constitutional adjudication where it is not absolutely essential to the disposition of the case. *Hagans v. Lavine*, 415 U.S. 528, 547 n.12 (1974).

Where, as here, uncertain questions of state law are closely intertwined with the constitutional challenge the Supreme Court has often stated that the state tribunal should be given an opportunity to provide ". . . an authoritative declaration of applicable state law." *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970); *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 640 (1959). Such principles were recently reaffirmed in *Carey v. Sugar*, —— U.S. ——, 96 S.Ct. 1208, 44 U.S.L.W. 4416 (1976).

The special circumstances of this case provide compelling reasons for extending to the Minnesota Supreme Court an opportunity to provide an authoritative declaration on the null and void provision. The Minnesota Legislature expressly indicated that the Pension Act was to have a limited duration and the opportunity of the State supreme court to construe such provision would serve to minimize federal-state friction. *See Harman v. Forssenius*, 380 U.S. 528, 534 (1965).

However, rather than merely abstaining from interpreting the null and void provision, thereby creating ". . . the delay

[1] E.g., a constitutional resolution would be unnecessary if the Minnesota Supreme Court interprets the Pension Act to have become null and void on September 2, 1974 and that as a result all accrued and existing causes of action likewise ceased to exist at that time.

and expense to which application of the abstention doctrine inevitably gives rise," *England v. Medical Examiners*, 375 U.S. 411, 418 (1964), this court chooses to avail itself of the Minnesota certification procedure, Minn. Stat. § 480.061 (1974).

This type of procedure has been recognized by the Supreme Court and used by the Court on various occasions. *See e.g., Bellotti v. Baird*, —— U.S. ——, 44 U.S.L.W. 5221 (1976); *Clay v. Sun Insurance Office*, 377 U.S. 179 (1964); *Dresner v. Tallahassee*, 375 U.S. 136 (1963). The Minnesota certification statute has been recognized by the Eighth Circuit[2] but the court's research has not disclosed any instance in which it has actually been used.

The certification procedure is not without its critics[3] but the court is persuaded that the unique circumstances of this case call for an articulation by the Minnesota Supreme Court and that certification is the most efficient means to achieve it. The court is confident that the Minnesota Supreme Court will expeditiously resolve the issues herein certified to the end that these proceedings may then go forward. Accordingly, the questions of the duration of the Minnesota Pension Act and the existence of causes of action thereunder will be certified to the Minnesota Supreme Court pursuant to Minn. Stat. § 480.061.

In the interim, while the certified questions are pending, this court chooses to go forward to establish such additional facts as are required for a final determination of all constitutional issues if the same becomes necessary. Pursuant to Fed. R.Civ.P. 53 a master will be appointed to determine (1) the contributions to the Pension Plan by the terminated Minnesota

[2] *See Guillard v. Niagara Machine and Tool Works*, 480 F.2d 20, 24-25 (8th Cir. 1973).

[3] *See In re Elliot*, 446 P.2d 347, 371 (Wash. 1968) (Hale, J. dissenting).

employees of Allied; (2) the actuarial assumptions which were applied to the Pension Plan; (3) the cost of pre-paid annuities under the Pension Act which would be purchased for the terminated employees of Allied; and (4) such other matters as the master deems relevant and necessary for a final determination of the constitutional issues.

Upon the foregoing,

IT IS ORDERED That the claims of Walter J. Fleck, Edyth A. Hamler and E. A. Richert, as contained in Counts I-III of the amended complaint be and the same hereby are in all respects dismissed.

IT IS FURTHER ORDERED That a certification order be issued to the Minnesota Supreme Court to construe the language of Minn. Stat. § 181B.17.

Dated: August 5, 1976.

GERALD W. HEANEY
Circuit Judge
Eighth Circuit Court of Appeals

EDWARD J. DEVITT
Chief Judge
United States District Court

DONALD D. ALSOP
District Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-75 Civ. 178

WALTER J. FLECK, EDYTH A. HAMLER, E. A. RICHERT, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and ALLIED STRUCTURAL STEEL COMPANY, a Delaware corporation,

Plaintiffs,

vs.

WARREN SPANNAUS, E. I. MALONE, PHYLLIS SPEILMAN and ALLIED STRUCTURAL STEEL COMPANY SALARIED EMPLOYEES' PENSION PLAN,

Defendants.

ORDER APPOINTING MASTER

Pursuant to the Memorandum Order of the court dated August 5, 1976, the court hereby appoints Gary J. Haugen as Master in the above-entitled matter to have and carry out the following duties:

1. determine the contributions to the Allied Structural Steel Company Salaried Employees Pension Plan by the terminated Minnesota employees of Allied Structural Steel Company;

2. determine the actuarial assumptions which were applied to the Allied Structural Steel Company Salaried Employees Pension Plan;

3. determine the cost of pre-paid annuities under the Minnesota Private Pension Benefits Protection Act which would

be purchased for the terminated employees of Allied Strural Steel Company;

4. determine such other matters as the Master deems relevant and necessary for a final determination of the constitutional issues.

Said Master shall be compensated as hereafter determined and be reimbursed for the reasonable expenses incurred in the performance of the duties prescribed herein.

The fees and expenses of said Master shall be apportioned equally amongst the parties to the action with the plaintiff Allied Structural Steel Company paying one-half of such amount and the defendant employees of the State of Minnesota paying the remaining one-half.

IT IS SO ORDERED.

Dated: August 5, 1976.

GERALD W. HEANEY
Circuit Judge
Eighth Circuit Court of Appeals

EDWARD J. DEVITT
Chief Judge
United States District Court

DONALD D. ALSOP
District Judge
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
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3-75 Civ. 178

WALTER J. FLECK, EDYTH A. HAMLER, E. A. RICHERT, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and ALLIED STRUCTURAL STEEL COMPANY, a Delaware corporation,

Plaintiffs,

vs.

WARREN SPANNAUS, E. I. MALONE, PHYLLIS SPEILMAN and ALLIED STRUCTURAL STEEL COMPANY SALARIED EMPLOYEES' PENSION PLAN,

Defendants.

CERTIFICATION ORDER

Pursuant to Minn. Stat. § 480.061 (1974) the United States District Court for the District of Minnesota hereby certifies the following questions of law based on the stated facts to the Minnesota Supreme Court.

STATEMENT OF FACTS

The relevant facts of this action are set forth in two previously issued Memorandum Orders of this court. *See* Memorandum Order dated March 18, 1976, 412 F. Supp. 366, and Memorandum Order dated August 5, 1976. Additional facts are set forth in a stipulation entered into between the parties. These orders and stipulation are submitted to the Minnesota Supreme Court for its consideration.

Also submitted to the Court for its consideration of the questions herein are the pleadings filed in this action and a copy

of the Allied Structural Steel Company Salaried Employees Pension Plan.

QUESTIONS OF LAW

(1) Upon what date did the Minnesota Private Pension Benefits Protection Act, Minn. Stat. § 181B.01 *et seq.* (1974) (hereinafter the "Minnesota Pension Act") become null and void pursuant to Minn. Stat. § 181B.17?

(2) What effect does the termination of the Minnesota Pension Act have upon any cause of action which may have accrued prior to the date of such termination but upon which no administrative proceeding had been commenced?

(3) What effect does the termination of the Minnesota Pension Act have upon any cause of action which was the subject of a pending administrative proceeding on the date of the termination of the Act?

IT IS SO ORDERED.

Dated: August 5, 1976.

GERALD W. HEANEY
Circuit Judge
Eighth Circuit Court of Appeals

EDWARD J. DEVITT
Chief Judge
United States District Court

DONALD D. ALSOP
District Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-75 Civ. 178

Walter J. Fleck, Edyth A. Hamler, E. A. Richert, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and Allied Structural Steel Company, a Delaware corporation,

Plaintiffs,

vs.

Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan,

Defendants.

MEMORANDUM OPINION

Before HEANEY, Circuit Judge, and DEVITT and ALSOP, District Judges.

HEANEY, Circuit Judge.

The plaintiffs brought this action to contest the enforceability and constitutionality of the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §181B.01 *et seq.* (1974) (hereinafter the Pension Act). The relevant facts are set forth in *Fleck v. Spannaus*, 412 F.Supp. 366 (D. Minn. 1976). In that decision, Judge Alsop held that the Pension Act was not preempted by the Employee Retirement Security Act of 1974, 29 U.S.C. §1001 *et seq.* (hereinafter ERISA) until January 1, 1975, and that a three-judge court was necessary to decide the various constitutional issues raised. On August 5, 1976, the three-judge court certified several questions to the Minne-

sota Supreme Court concerning the Pension Act's "self-destruct" provisions and held that the individual plaintiffs, two employees of Allied Structural Steel Company (hereinafter Allied) and the pension fund trustee, lacked standing to sue. In addition, the court ordered the appointment of a special master to take evidence and make findings on certain factual matters.

Pursuant to Judge Alsop's certification order, the Minnesota Supreme Court held that the Pension Act continued in effect until January 1, 1975, when the provisions of ERISA preempted the state act and that this preemption preserved the pending causes of action. In other words, the terms of the Pension Act were in force and applicable to the eleven employees terminated by Allied on July 31, 1974.

On April 7, 1977, the special master issued his findings to which the parties subsequently stipulated. In particular, he found that:

1) it was impossible to determine which contributions by Allied to the plan were allocable to the terminated employees;
2) there were insufficient assets in the pension fund to pay the terminated employees after paying all employees who had vested rights under the plan;
3) the possibility of a plant closure was not considered in calculating Allied's annual contributions to the pension plan; and
4) the cost of prepaid deferred annuities which Allied would have to purchase for the terminated employees ranged from $114,171.93 to $185,751.00.

Before this three-judge court, Allied claims the Pension Act suffers the following constitutional infirmities:

1) it impairs the obligation of contract; and
2) it violates the due process, equal protection and commerce clauses of the United States Constitution.

Although Allied raises each of these issues in its initial complaint, they seem to rely almost entirely on the contract clause argument. Accordingly, our decision will focus primarily on this issue.

I. *The Impact of United States Trust Co. of New York v. New Jersey.*

Over the last century, the Contract Clause of the United States Constitution has played a limited role in constitutional adjudications concerning limitations on state power. A recent decision of the United States Supreme Court, *United States Trust Co. of New York v. New Jersey*, —— U.S. ——, 52 L.Ed.2d 92 (1977), provides the most definitive statement on the current status of the Contract Clause. This case involved a statutory covenant between New York and New Jersey which limited the ability of the Port Authority to subsidize rail passenger transportation from revenues and reserves pledged as security for bonds issued by the Authority. In 1974, the legislatures of both states repealed the security promise in the 1962 covenant. The legislation was sought when it became apparent that, in providing a greater share of its revenues for rail mass transit, Port Authority reserves would drop below levels promised as security in the original covenant. *United States Trust Co. of New York v. New Jersey, supra* at 52 L.Ed.2d 102-104.

In assessing the bondholders' Contract Clause challenge, the Supreme Court began by drawing an important distinction between general regulatory legislation impairing a range of private contracts and legislation abrogating a particular contract to which the state was a party. As to the former, the

Court acknowledged that a more relaxed standard of review must apply; but when the state itself was a party, it conceded that complete deference to the legislature's judgment was inappropriate.

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. * * * As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> * * *
>
> In applying this standard [to the instant case], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.

United States Trust Co. of New York v. New Jersey, supra at 52 L.Ed.2d 109-110, 112.

Thus, an important first step in analyzing the constitutionality of a particular impairment is to determine the nature the contractual relation with which the law conflicts.

A second issue addressed by the Court in determining the constitutionality of a particular impairment is the extent of that impairment. *Id.* at 113. Without drawing a clear distinction between substantial and insubstantial impairments, the Court, at several points in the opinion,[1] suggested that a factor to be considered in determining the extent of impairment is the legitimate expectations of the contracting parties. "Ap-

[1] *United States Trust Co. of New York v. New Jersey*, —— U.S. ——, 52 L.Ed2d 92,,n.17, n.26 (1977).

parently, to the extent the obligation imposed or abrogated by the challenged legislation was, in fact, or could have been anticipated by the contracting parties, the impairment of those bargained for expectations is diminished.

Ultimately, the Court held that an impairment can be sustained only if reasonable and necessary to serve important purposes of the state. *Id.* at 114. Total repeal of the 1962 covenant was not necessary, in the Court's judgment, because less drastic modifications of the security terms would have accomplished the state's objectives. The legislation was not reasonable because the state was well aware of pending mass transit problems when the covenant was enacted. *Id.* at 114, 115.

With this review of the Supreme Court's most current statement on the Contract Clause, we now turn to the instant case.

II. *The Extent of Impairment.*

Allied argues and the State of Minnesota seems to concede that there has been an impairment of contract. Our attention is directed then to the extent of that impairment. In this regard, Allied contends that the impairment is substantial because the Pension Act burdens employers with pension obliga-

tions that were not actuarially anticipated.[2] First, Allied argues that their contributions to the pension plan were actuarially determined on the basis of certain assumptions and that by providing benefits to those who would have forfeited their benefits under those assumptions, unanticipated

[2] The actuarial assumptions and funding method used in developing the Allied pension plan are set forth at Exhibit 7 of the Special Master's Findings:

Mortality rates — Group Annuity Table for 1951 projected to 1960, set back 5 years for women.

Disability rates:

Age	*Rate (%)*
37	.1
42	.1
47	.2
52	.6
57	1.1
62	3.2

Termination rates before retirement, all causes:

	Rate (%)	
Age	*Men*	*Women*
22	5.4	5.4
27	4.5	4.5
32	3.3	3.3
37	2.0	2.0
42	1.0	1.0
47	.7	.5
52	1.3	1.0
57	2.2	1.8
62	4.9	4.3

Salary scale:

Age	*Present salary as a percent of salary at 65*
22	33.1%
27	40.9
32	49.0
37	57.4
42	65.9
47	74.4
52	82.8
57	91.1
62	98.2

Retirement age — 66, or completion of service requirement if later.

Interest rate — 4-1/2%.

Valuation of assets — At cost, with accrual of unpaid company contribution.

Funding method — Entry age normal cost-frozen initial liability.

liability is imposed. This argument is belied by Allied's own admission that the possibility of plant closure was not relied upon by their actuaries in calculating plan contributions.[3]

Closely paralleling the preceding argument, Allied claims that the ten-year vesting provision of the Pension Act imposes liability which was not anticipated by Allied or its actuaries. We do not quarrel with their claim that an acceleration of vesting was not anticipated and that the Pension Act impaired Allied's employment agreements in this regard. Nevertheless, we do not believe the obligations imposed by the Pension Act unconstitutionally expand upon the contracting parties initial expectations or the actuaries' original assumptions.

Generally, employer contributions to pension plans are determined in the following fashion. Actuaries first calculate the amount an employer is likely to pay out in benefits over the course of the plan; this calculation, of course, is based on certain assumptions regarding mortality, job changes, and other causes of employee turnover.[4] To meet this anticipated

[3] Allied's argument in this regard does highlight a different aspect of the termination problem. Because plant closure is not actuarially anticipated, forfeiture of pension benefits for this reason may actually provide a windfall to the employers. As noted in *Lucas v. Seagrave Corporation*, 277 F.Supp. 338, 345 (D. Minn. 1967):

> [I]t has been asserted that an employer's pension plan contributions are determined by an actuarial formula which assumes that any employee whose employment is terminated forfeits his pension benefits. * * * However, such an assumption may not cover the occurrence of a group termination. The actuarial formula assumes a reasonable turnover rate for employees established by experience with individual separations over a period of time. Where there is a termination of a substantial number of the plan participants, it seems clear that such a turnover is not anticipated by the formula. The result is that an employer who has discharged a relatively large number of employees receives a windfall, palpably in excess of actuarial assumptions, in the form of pension credit forfeitures which he can use to relieve for some time his future premium liability for the remaining employees.

[4] *See* n.3, *supra*. We note again that these assumptions do not include the prospect of plant closure.

liability, the actuaries next project the amount an employer must contribute to adequately fund these future payments. For example, an actuary may determine that annual contributions of two or three percent of payroll are necessary to meet the first series of anticipated payments and to accumulate an interest-earning reserve to cover the remainder of the plan.

Certainly, Allied did not and could not be expected to anticipate the possibility of vesting at an earlier date for the terminated Minnesota employees. But, the claim that payment to these employees was not anticipated distorts the way actuarial assumptions and funding plans operate and ignores the fact that a portion of Allied's annual contribution was made to accumulate a reserve sufficient to make payments to these employees at some future date. In other words, while the date of payment could not be anticipated, the likelihood of payment was, as was the need, to accumulate a reserve for that purpose.

We raise the preceding arguments not to suggest that a sufficient fund has accumulated in the Allied pension plan out of which Pension Act liabilities can be paid. In fact, the Pension Act does not impose any liability on pension plan funds for the payment of forfeited benefits. The Act specifically provides that the *employer* is liable for payment of the pension funding charge and that funds already contributed to the plan are to remain for the benefit of continuing employees. *See* Minn. Stat. §§181.03-.07, 181B.02 subd. 18, and 181B.16 (1974). Rather, the arguments raised above are offered to shed some light on the concerns expressed by the Supreme Court in *New York Trust* for the "legitimate expectations of the contracting parties." We believe the obligations imposed by the Pension Act are not so significantly beyond the parties' initial expectations that the Act should be declared unconstitutional.

III. *The Reasonableness and Necessity of the Impairment.*

As reaffirmed in *New York Trust*, the standard for reviewing state legislation impairing private contracts varies with the nature of that contractual relationship. When the state is not a party to the contract, far greater deference is given to the legislative judgment that the impairment is reasonable and necessary to the accomplishment of legitimate policy aims. In granting states broader powers to adopt general regulatory measures, it is probably assumed that the legislature will act impartially and in the best interest of all when it is not itself a party to the contract impaired. Note, *The Constitutionality of the New York Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U.Pa.L.Rev. 167, 188-191 (1976). Since the State of Minnesota was not a party to the contracts allegedly impaired by the Pension Act,[5] we must review that legislation with considerable deference to the policy judgments of the Minnesota legislature.

Before addressing the reasonableness and necessity of the Pension Act provisions, we must first examine the various policy aims that led to its enactment. *United States Trust Co. of New York v. New Jersey, supra* at 52 L.Ed.2d 112. When plants shut down, employees lose both their jobs and, in many cases, their pension rights. Accumulated pension credits may

[5] The contracts allegedly impaired by the Minnesota Pension Act are: (1) the employment agreements entered into by Allied and its employees, and (2) the trust agreement between Allied and the trustee of its pension plan. The terms of the employment agreements included wage rates, working conditions and fringe benefits, one of which was a pension plan with vesting to occur after twenty years. The Pension Act allegedly impairs those agreements in that it requires vesting of pension benefits after ten years if Allied ceases to do business or substantially reduces its work force in Minnesota. The terms of the trust agreement require payment by Allied in accord with actuarial projections which are predicated on vesting after twenty years. The Pension Act allegedly impairs that agreement because Allied must incur additional expense to provide benefits for persons whose benefits would be forfeited by plant closure.

be forfeited even when terminated employees are within a few months of qualifying for retirement. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 Harv.L.Rev. 952 (1962) (hereinafter Bernstein). The loss sustained by separated employees can be viewed either as a future loss of retirement income or as a present loss of compensation corresponding to the amount of employee contributions on their behalf.

Certainly, the State of Minnesota has a strong and legitimate interest in protecting the economic welfare of its senior citizens by assuring the receipt of earned pension benefits as a form of retirement income. The forfeiture of anticipated retirement income is particularly hazardous because it affects individuals at an age when they often have no other source of substantial income.[6] Mass forfeiture of retirement benefits is likely to adversely affect the employees' immediate economic community through the loss of buying power and increased demand for welfare funds and related services.[7]

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[6] The three major sources of income for those of retirement age are private pensions, social security benefits and private savings. *See* C. Siegfried, *"The Role of Private Pensions" in Private Pensions and the Public Interest* 7, 9 (1970). While social security benefits are available to a wide segment of the elderly population, those benefits by themselves seldom provide sufficient income to meet ever-increasing costs of living. *See, e.g.*, R. Nader and K. Blackwell, *You and Your Pension* 13 (1973). And it is widely acknowledged that few individuals are able to accumulate sufficient savings through their working years to provide significant income after retirement. *See generally* M. Bernstein, *The Future of Private Pensions* 155-157 (1964).

[7] Congress explicitly recognized the same concerns during hearings on the bills that were eventually enacted into law as ERISA:

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire.

S. Rep. No. 93-383, 93rd Cong., 2d Sess. (1974); Pension Reform Act, 8A *U.S. Code Cong. and Adm. News* 508, 516 (1974); H.R. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), Pension Reform Act, 8A *U.S. Code Cong. and Adm. News* 288, 294 (1974).

But, in our judgment, the loss of retirement income is only one aspect of the problem. Pension plans are usually instituted as a means of attracting and holding employees. Bernstein, *supra* at 964. Individuals who decide to work for an employer who offers a pension plan over an employer who does not, choose, in essence, to sacrifice the higher salary the non-plan employer may pay for the security of retirement income. Employer contributions to pension funds must be recognized as a substitute for present compensation. As one authority explains,

> Unions and employers are often quite specific in equating employer pension plan contributions with employee wage compensation. Unions demand increases of X cents per hour in money wages and Y cents per hour in fringe benefits, including pension plan contributions. Employers respond with counter-offers in precisely the same terms.
> * * * *
>
> The basic purposes of nonbargained plans are the same as those of bargained plans. As far as employees are concerned the purposes of the plan are to provide income when age forces retirement from employment. * * * Thus, as a general proposition, nonbargained plans seem no less a part of employee compensation than bargained plans.

Since the *Inland Steel*[8] case the courts and the National Labor Relations Board have held pension plans to be "wages" and, in addition, "condition[s] of employment" under the Labor-Management Relations Act of 1947 and

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[8] *Inland Steel Co. v. N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, *cert. granted on other grounds and aff'd*, 338 U.S. 382 (1949).

> its predecessor, the Wagner Act. * * * The demand to bargain [in *Inland Steel*] did not turn the contribution and the pension plan into "wages"; rather it was the nature of the inducement by the company to the employees and the value of the contributions and the benefits to the employees which made them "wages."

Bernstein, *supra* at 960-961.

Thus, the loss sustained by terminated employees has both present and future implications for the employees themselves and for their immediate community, we have no trouble concluding that the Minnesota legislature, in enacting the Pension Act, was addressing a problem of vital public interest.

The next area of inquiry is whether the terms of the Pension Act are reasonably adapted to and necessary for the accomplishment of these vital interests. We think they are. Allied contends that the provisions of the Act are neither reasonable nor necessary because: (1) the Act was designed to benefit only a limited class of persons, (2) the Act does not provide for a grace period during which an employer whose pension plan was not fully funded might reach full funding, and (3) the Act does not permit employers to voluntarily terminate their pension plans.

Admittedly, the Pension Act does not address all the problems existing in private pension programs. The Act prevents only the forfeiture of accumulated pension benefits by substantial numbers of employees when that forfeiture is caused by plant closure. It is well established, however, that in exercising its police powers, a state need not address all aspects of a particular problem. As observed by the Supreme Court in an analogous police power decision,

> [i]n establishing a system of unemployment benefits the

> legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt.

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 519-520 (1937) (citations omitted).

It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan. However, Allied's contention that the Pension Act as aimed solely at White Motor retirees is totally unfounded. There is absolutely no evidence from the legislative history or debates on the Pension Act to support Allied's claim that the Act was aimed solely at White Motor Corporation.

Allied's other contentions that a grace period was not allowed and that there was no option to voluntarily terminate its plan can be answered quite simply. Undoubtedly, the Minnesota legislature rejected both of these alternatives because either would have been inconsistent with the Act's central purpose—to assure some measure of retirement income to those affected by present plan closures and plan terminations. Although the legislature might have adopted a less drastic means to accomplish its purpose, the approach it chose is not unreasonable or arbitrary merely because it requires funding to commence from the date of enactment.

IV. *The Commerce Clause Challenge.*

Allied claims that interstate commerce is unreasonably burdened because the Pension Act's funding charge discourages Minnesota employers from terminating their operations in this state and moving them or their investment capital elsewhere. Relying on *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Allied argues that the Pension Act, in effect, requires

business operations to be performed in the home state when those operations could be more efficiently performed in another. *Id.* at 145. In *Pike*, the Supreme Court set forth the standard for determining whether state legislation unduly burdens interstate commerce:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted).

It is clear from the statutory language of the Pension Act that local and interstate commerce are treated alike. Any employer of 100 or more employees who terminates a pension plan or ceases operations in the state is affected by the Act. *See* Minn. Stat. §§181B.02, subd. 2, 181B.03-06. As held above, the Act clearly effectuates a vital and legitimate policy of local interest. Thus, the question becomes whether the burden imposed on interstate commerce is excessive in relation to that legitimate local benefit. We do not think it is excessive.

The Pension Act burdens commerce in much the same way as other forms of employer protection legislation; the costs of doing business in Minnesota are increased to further an important state policy. Costs of a similar nature are imposed by workmen's compensation, unemployment compensation and social security statutes and each has been unheld against constitutional attack. *See Helvering v. Davis*, 301 U.S. 619 (1937) (social security); *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 219 (1937) (unemployment compensation); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (workmen's compensation). The local policy effectuated by the Pension Act is equal in importance to aims achieved by the preceding legislation. In our judgment, this vital interest outweighs the attendant burdens on interstate commerce.[9]

V. *The Due Process Challenge.*

Allied asserts that the Pension Act violates the Due Process Clause of the Fourteenth Amendment by divesting Allied of property rights—the right to withhold pension benefits for failure to meet age and service requirements it had contracted for prior to the Act's passage. The considerations involved in Allied's due process challenge are substantially the same as

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[9] Two recent Supreme Court cases sustaining Commerce Clause attacks on state legislation do not compel a contrary result. Both involved state interests of considerably less importance. In *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), the State of Mississippi claimed that a regulation allowing the sale of outstate milk products in Mississippi only if the selling state accepted Mississippi milk products on a reciprocal basis was enacted to maintain state health standards. The Court regarded this purported justification as "border[ing] on the frivolous." *Id.* at 375. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), an Arizona statute required cantaloupes grown in the state to be packed in conformity with certain standards and approved by a state supervisor. The practical effect of the statute was to compel an Arizona grower, with adequate packing facilities thirty-one miles away in California, to build similar facilities in Arizona. *Id.* at 140. The purpose of the statute was simply "to protect and enhance the reputation of growers within the State." *Id.* at 143. The Court held, "such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best. * * *" *Id.* at 146.

those previously considered under the Contract Clause. We have held that the Pension Act is a valid exercise of the state's police power aimed at protecting an important and legitimate interest of certain state residents. For that reason, we need only address here those arguments peculiar to Allied's due process challenge: namely, whether the Pension Act is retroactive in application and, if so, whether that retroactivity violates the Due Process Clause.

Allied argues that the Pension Act's funding charge is based on pension benefits earned prior to enactment of the legislation. It is true that the Act does look to service performed prior to enactment to determine the amount of accumulated benefits, but the events which trigger the funding charge all occur after the effective date of the Act, April 10, 1974. Thus, the Act is directed only at forfeitures which arise from plant closures occurring after April 10. *Accord, Willys Motors v. Northwest Kaiser-Willys*, 142 F.Supp. 469 (D. Minn. 1956). Allied closed its Minnesota plant on July 31, 1974, over three months after the effective date of the Pension Act.

Even if we found the Act to operate retroactively, that alone does not render a statute invalid. It is well settled that legislation aimed at a legitimate local interest may be valid irrespective of any retroactivity. *See, e.g., Usery v. Turner Elkorn Mining Co.*, —— U.S. ——, 49 L.Ed.2d 752 (1976); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The Supreme Court set forth the relevant test for determining whether retroactive legislation is valid as an exercise of the state's police power in *Goldblatt v. Town of Hempstead, supra* at 594-595:

> To justify the state in * * * interposing its authority in behalf of the public, it must appear—first, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

For the reasons stated above, we believe the Pension Act accomplishes a vital public interest, is reasonably adapted to that end and is not unduly oppressive in its impact on Allied. It is valid therefore, irrespective of any alleged retroactive effect.

VI. *The Equal Protection Challenge.*

Allied commences its equal protection challenge with the claim that in recent years, the "rational basis" standard for determining the validity of state statutes has been replaced by a new test which requires that the classification bear a substantial and significant relation to its claimed objective. *Women's Liberation Union of Rhode Island, Inc. v. Israel*, 379 F.Supp. 44, 49-50 (D. R.I. 1974), *aff'd*, 512 F.2d 106 (1st Cir. 1975). *See Dorrough v. Estelle*, 497 F.2d 1007, 1011 (5th Cir. 1974); *Lucas v. Secretary, Dept. of HEW*, 390 F.Supp. 1310 (D. R.I. 1975). A close examination of these decisions reveals that the emerging middle standard of review, somewhere between the rational basis test and strict judicial scrutiny, has been applied to classifications falling just short of the "suspect classification" category or of infringing fundamental rights.[10] Recent decisions of the Supreme Court demonstrate unequivocally that where business or economic regulation is at issue and no potentially suspect classification is involved,

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[10] In *Dorrough v. Estelle*, 497 F.2d 1007 (5th Cir. 1974), the emerging middle standard was applied to the classifications in a Texas statute denying a criminal appeal to certain classes of criminal escapees. A Rhode Island statute excluding women from certain types of bars was more carefully examined by the court in *Women's Liberation Union of Rhode Island, Inc. v. Israel*, 379 F.Supp. 44 (D. R.I. 1974), *aff'd*, 512 F.2d 106 (1st Cir. 1975). Finally, in *Lucas v. Secretary, Dept. of HEW*, 390 F.Supp. 1310 (D. R.I. 1975), the court followed the standard applied in *Women's Liberation Union of Rhode Island, Inc. v. Israel, supra*, to strike down distinctions drawn between legitimate and illegitimate children.

the traditional rational basis standard still applies. *City of New Orleans v. Dukes*, —— U.S. ——, 49 L.Ed.2d 511 (1976); *Borass v. Village of Belle Terre*, 416 U.S. 1 (1974). Thus, because Allied challenges local economic regulation, we must give considerable deference to the classifications chosen by the legislature and uphold those classifications "if any state of facts reasonably may be conceived to justify [them]." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

The first set of challenged classifications are readily justified under the relevant standard. They are:

1) the Act's regulation of employers with more than 100 employees while failing to cover smaller employers; and
2) the Act's exclusion of state and local government employees and employees of tax-exempt organizations.

In our judgment, these exclusions are based on rational policy aims. First, national and statewide experience indicated that plan terminations by major private businesses caused hardship to the greatest number of aged citizens and imposed the most severe burden on states to remedy those hardships through public assistance. Certainly, it was not unreasonable for the legislature to fashion a remedy appropriate to the most immediate need. Similarly, tax-exempt organizations and state and local government employers were excluded because the legislature determined the need for protection was greatest in private industry of substantial size. ERISA excludes tax-exempt and public employees for the same reason. 29 U.S.C. §1003 (b) (1), (2).

Allied also attacks the exclusion of employers who have made the maximum allowable contribution deductible under §404 of the Internal Revenue Code for a designated sum of years preceding termination. This exclusion is justifiable on

the ground that one of the Pension Act's obvious purposes is to encourage employers to fund their plan to the maximum extent possible. It seems perfectly reasonable to exclude those employers who have attempted to maintain a relatively high funding level. The maximum deductible contribution was simply taken as a readily identifiable bench mark for separating out plans more likely to be adequately funded.

Finally, Allied challenges the Pension Act's exclusion of "non-qualified" plans under §401 of the Internal Revenue Code. The defendants argue that this classification was drawn to reduce the coverage of the Act to make it administratively manageable. While we have some doubts about this rationale, there is justification for assuring that state resources allocated to policing the Act are kept within manageable limits. *See Mathews v. Lucas*, —— U.S. ——, 49 L.Ed.2d 651 (1976).

For these reasons, we find no violation of the equal protection clause.

In accord with the preceding discussion, the Pension Act is sustained against each constitutional challenge.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law. Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Speilman and against Allied Structural Steel Company Salaried Employees' Pension Plan. Costs and disbursements will be taxed to the plaintiffs.

GERALD W. HEANEY
United States Circuit Judge
EDWARD J. DEVITT
Chief Judge
United States District Court
DONALD D. ALSOP
United States District Judge

Dated: September 2, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-75 Civ. 178

WALTER J. FLECK, EDYTH A. HAMLER,
E. A. RICHERT, as Fiduciary of the
Allied Structural Steel Company Salaried
Employees' Pension Plan, and
ALLIED STRUCTURAL STEEL COMPANY,
a Delaware corporation,

Plaintiffs,

v.

WARREN SPANNAUS, E. I. MALONE,
PHYLLIS SPEILMAN and ALLIED STRUCTURAL
STEEL COMPANY SALARIED EMPLOYEES'
PENSION PLAN,

Defendants.

Before HEANEY, Circuit Judge, and DEVITT and ALSOP, District Judges.

ORDER

The unpublished Memorandum Opinion in the above styled case, filed September 2, 1977, is amended as follows:

ON PAGE 17, LAST PARAGRAPH: Delete from the end of the second sentence the words "Salaried Employees' Pension Plan". The sentence should now read: "Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Speilman and against Allied Structural Steel Company."

The Clerk of Court is directed to enter a revised judgment accordingly.

GERALD W. HEANEY
United States Circuit Judge
EDWARD J. DEVITT
Chief Judge
United States District Court
DONALD D. ALSOP
United States District Judge

Dated: September 22, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. Civ. 3-75-178

WALTER J. FLECK, EDYTH A. HAMLER,
E. A. RICHERT, as Fiduciary of the
Allied Structural Steel Company Salaried
Employees' Pension Plan and
ALLIED STRUCTURAL STEEL COMPANY,
a Delaware corporation,

Plaintiff,

vs.

WARREN SPANNAUS, E. I. MALONE,
PHYLLIS SPEILMAN and ALLIED STRUCTURAL
STEEL COMPANY SALARIED EMPLOYEES'
PENSION PLAN,

Defendant.

You are hereby notified that in the above entitled case on the 22nd day of September, 1977, filed and entered Order (Heaney, Devitt and Alsop—9-22-77) that the unpublished

Memorandum Opinion in above stylted case, filed Sept. 2, 1977 is amended as follows:

On Page 17, Last Paragraph: Delete from the end of the second sentence the words "Salaried Employes' Pension Plan". The sentence should now read: "Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Speilman and against Allied Structural Steel Company". The Clerk of Court is directed to enter a revised judgment accordingly.

HARRY A. SIEBEN, Clerk
By Bernadine L. Brown
Deputy Clerk

JUDGMENT filed and entered.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-75 Civ. 178

(Title of case omitted in printing)

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

To: Defendants and their attorney, Kent G. Harbison, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota 55155

Notice is hereby given that Walter J. Fleck, Edythe A. Hamler, E. A. Richert, and Allied Structural Steel Company, the plaintiffs above named, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the final judgment entered in this action on September 2, 1977, and the revised final judgment entered on September 22, 1977.

Dated: September 27, 1977.

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[Affidavit of service omitted in printing]

CHAPTER 181B
PRIVATE PENSION BENEFITS PROTECTION

181B.01 CITATION. Sections 181B.01 to 181B.17 shall be known and may be cited as the "private pension benefits protection act".

181B.02 DEFINITIONS. Subdivision 1. As used in sections 181B.01 to 181B.17, the following terms shall have the meanings given.

Subd. 2. "Employer" means any person, firm or corporation who employs 100 or more people at least one of whom is employed in this state at any time within one year prior to the date that it ceases to operate a place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 3. "Place of employment" means any location within this state at which an employer employs any employees at any time within one year prior to the date that the employer ceases to operate at such location or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 4. "Employee" means any person employed at the place of employment at any time within one year prior to the date when the employer ceases to operate the place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14. "Employee" also means any person who is not employed by the employer but who was formerly employed in this state, and is eligible or will be eligible without the earning of additional pension credits to receive a pension benefit from the employer's pension plan.

Subd. 5. "Commissioner" means the commissioner of labor and industry.

Subd. 6. "Ceases to operate a place of employment or a pension plan" means:

(a) The complete termination of operations at a place of employment, or

(b) A substantial reduction in the number of employees at a place of employment, or

(c) The termination or substantial reduction of pension plan operations or benefits for all or a portion of an employer's employees.

The term shall not mean any temporary cessation of operations or reduction of employees. Neither shall the term mean any cessation of operations by a single employer who participates in a pension plan to which more than one employer makes contributions if such cessation does not also entail the termination of the master pension plan. In determining whether any reduction has been substantial the commissioner shall take into consideration not only the absolute size of the reduction but the relative size of the reduction as it relates to the corporate and employment history of the group or subgroup suffering the reduction. In addition, the commissioner may find that a number of unsubstantial reductions are, for the purposes of sections 181B.01 to 181B.17, equivalent to a substantial reduction. When an employer ceases to operate a place of employment or a pension plan but offers to retain without loss of pension credit all of the employees in comparable jobs with equal or increased compensation at another location within the state or at some other location outside this state as specified in any voluntary agreement authorized by section 181B.10, sections 181B.01 to 181B.17 shall not apply except as it affects persons not employed by the employer but who are eligible or will be eligible without the earning of additional pension credits to receive the pension benefits from the employer's pension plan.

Subd. 7. "Pension plan" means any plan, fund or program which is established, maintained or entered into by an employer for the purpose of providing retirement benefits for its employees, or their beneficiaries and which is designated as a qualified pension plan under section 401 of the United States Internal Revenue Code of 1954 as amended, but does not mean any plan established by collective bargaining agreement which is excluded from the covereage of 29 U.S.C. 186(c)(5) (B) by 29 U.S.C. 186(g) and for which the employer has no administrative responsibility and no responsibility for the establishment of the retirement benefit schedule. Sections 181B.01 to 181B.17 shall not apply to any retirement fund or program providing benefits only for public employees of the federal government or the state government or a subdivision of the state, nor shall it apply to any pension plan established on behalf of a religious, charitable, or educational organization as defined by Section 501(c) (3) of the United States Internal Revenue Code of 1954 as amended. Further, sections 181B.01 to 181B.17 shall not apply to any money purchase, profit sharing, or stock bonus plan in which no definitely determinable level of benefits is stipulated to be given to qualified plan participants at normal retirement age or some other age.

Subd. 8. "Normal retirement benefit" means that benefit payable under a pension plan in the event of retirement at the normal retirement age.

Subd. 9. "Normal retirement age" means the lesser of either the normal retirement age as prescribed by the pension plan or age 65.

Subd. 10. "Accrued portion of the normal retirement benefit" with respect to employees of ten or more years of covered service means the larger of either the present value of the pen-

sion benefit which the employee has earned prior to cessation under the terms of the pension plan itself or the present value of the normal retirement benefit to which the employee would be entitled under the plan as in effect on the date of the cessation if he continued to earn pension credits based on the covered service he would have accumulated had he continued as a plan participant until normal retirement age or if he continued to earn annually until normal retirement age the same rate of compensation as that which he had been earning prior to cessation, upon which his pension credit would have been computed under the plan at the rate specified by the plan for the years subsequent to the cessation, multiplied by a fraction not to exceed one, the numerator of which is the total number of his years of covered service as of the date of cessation, and the denominator of which is the total number of years he would have had in covered service in such plan as of normal retirement age if he had continued to be an active participant in the plan until attaining such age.

With respect to employees with less than ten years of covered service, the defining term means the present value of the total amount of pension benefits which have been vested on or prior to the date of cessation. Where the above formulas are inapplicable or inequitable the defined term means that portion of the normal retirement benefit to which the commissioner determines actuarially the employee should be entitled based on the covered service of the employee, as of the date of the cessation.

Subd. 11. "Covered service" means the longer of either:

(a) The period of employment with an employer including predecessor employers as allowed in section 181B.07, clause (1) which is recognized under the terms of the employer's pension plan for the purposes of determining either

an employee's eligibility to receive benefits under the plan or the amount of such benefits, or

(b) The amount of time after institution of the present pension plan or any substantially similar predecessor plan that an employee has been continuously employed in a full time capacity by an employer including predecessor employers as allowed in section 181B.07, clause (1) prior to the cessation of operations. Temporary and seasonal layoffs and unpaid vacations and leaves of absence need not be credited as covered service but neither shall they serve to interrupt an employee's continuity of service. Part time employment may be credited as covered service if the commissioner determines that a previous full time employee has been reduced to part time status as part of a plan to evade provisions of sections 181B.01 to 181B.17.

Subd. 12. "Vested right" means a legal right obtained by an employee participating in a pension plan to that part of an immediate or deferred pension benefit which arises from the employee's covered service under the plan and is no longer contingent on the employee remaining covered under the plan.

Subd. 13. "Vested pension benefit" means that accrued portion of the normal retirement benefit of an employee participating, or who has participated, in a pension plan to which the employee has a vested right.

Subd. 14. "Nonvested pension benefit" means the accrued portion of the normal retirement benefit of an employee participating in a pension plan to which the employee does not have a vested right.

Subd. 15. "Present value of the total amount of nonvested pension benefits" means that sum of money which if earning interest in a secure investment from the date of the cessation of operations onward would equal the value of the

nonvested pension benefit on the date on which the plan participant reached normal retirement age.

Subd. 16. "Present value of the total amount of vested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the vested pension benefit on the date on which the plan participant reached normal retirement age minus that sum of money which is set aside in trust or exclusively reserved to finance pension benefits for plan participants.

Subd. 17. "Present value of the normal retirement benefit" means that sum of money which if earning interest in a secure investment from the date of the cessation of operations onward would equal the value of the normal retirement benefit on the date on which the plan participant reached normal retirement age.

181B.03 PENSION REFUNDING CHARGE, VESTED BENEFITS PRIOR TO PENSION BENEFITS PROTECTION ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.04 NONVESTED BENEFITS PRIOR TO ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.05 VESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring after April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.06 NONVESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon covered service occurring after April 10, 1974, of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.07 EXCEPTIONS TO PENSION FUNDING REQUIREMENTS. An employer shall not be liable for any pension funding charge under sections 181B.03 to 181B.06 when (1) the employer ceases to operate a place of employment or a pension plan as a result of merger, consolidation, or acquisition of assets, if the successor to the employer continues the pension plan of the employer or establishes a comparable pension plan which covers all previously covered employees of the employer with no reduction in credited covered service for purposes of sections 181B.01 to 181B.17 and no reduction in the value of the pension credits already earned by the employees; or (2) the employer ceasing to operate a place of employment or a pension plan has (a) in each of the five years prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended, or (b) in at least eight of the ten years immediately prior to

cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended, or (c) when the pension plan has been instituted less than five years prior to cessation, in every year since the institution of the plan, made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended.

181B.08 NOTICE OF INTENTION TO CEASE OPERATIONS. Any employer who intends to cease to operate a place of employment or a pension plan within this state shall notify the commissioner of such intention not later than six months prior to the date the employer intends to cease such operation. In the case of an employer who intends to cease to operate a place of employment or a pension plan within this state within six months of April 10, 1974, the notice required by this section shall be given by the employer as soon as practicable, but not later than ten days after April 10, 1974.

181B.09 INVESTIGATION BY COMMISSIONER. Upon receipt of such notification, or upon his own initiative when such notification is not given as required, the commissioner shall cause an investigation to be made of the employer to determine the number of employees who have completed ten or more years of covered service under the pension plan of the employer and whose nonvested or vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the amounts of such nonvested or vested pension benefits, if any, of such employees, and any other facts or circumstances concerning the employer, his employees and the pension plan for such employees as may be

necessary or useful to the commissioner to carry out his duties and responsibilities under sections 181B.01 to 181B.17. The investigation, insofar as practicable, shall be conducted at the employer's place of business during normal business hours. The employer shall cooperate fully with the commissioner in such investigation, and shall make available to him any books, records or other information necessary or useful to such investigation. To aid in such investigations, the commissioner is authorized to administer oaths and affirmations and to issue subpoenas to compel the attendance of witnesses or the production of books, records or other documents. The commissioner may seek, through the attorney general acting on his behalf, orders from any court of competent jurisdiction to compel an employer to comply with the provisions of sections 181B.01 to 181B.17 and to punish disobedience of any subpoena issued pursuant to sections 181B.01 to 181B.17.

181B.10 DETERMINATION OF AMOUNT OF BENEFITS; AGREEMENTS AS TO BENEFITS. As part of the investigation of an employer, the commissioner shall determine the amount of nonvested and vested pension benefits which have been compromised or settled to his satisfaction. Nonvested and vested pension benefits may be compromised or settled by voluntary agreement between the employer and individual employees which is mutually understood by both parties to be a complete and final satisfaction of the employer's obligations regarding such benefits, provided that both parties are made fully aware of their rights and obligations under sections 181B.01 to 181B.17 prior to the making of such voluntary agreement. Before any such settlement can be made it must be approved by the commissioner. The commissioner shall not approve any settlement that is not fair and equitable. Further, for all settlements entered into by the employer the relationship between the present value of the com-

promised pension credits and the value of the settlement must be as constant as is practicable.

181B.11 CERTIFICATION OF AMOUNTS AVAILABLE. After the investigation of the employer the commissioner shall certify to the employer the present value of the total amount of nonvested and vested pension benefits which are includable in determining an employer's pension funding charge liability under sections 181B.01 to 181B.17 and the amount of such benefits which have been compromised or settled to the satisfaction of the commissioner. When the assets of an employer available for distribution under sections 181B.01 to 181B.17 are less than the sum total of the pension funding charges owed to employees as calculated by the commissioner, the commissioner shall calculate the proportion of available assets owed to each employee so that the actual amount to be received by any covered employee at normal retirement age divided by the amount that employee would have received at normal retirement age had there been no shortage of assets available for distribution under sections 181B.01 to 181B.17 is a ratio as constant as is possible from employee to employee. In seeking to keep such ratio constant the commissioner shall consider the amounts to be received by an employee from trust fund assets set aside for employee pension benefits but unavailable for distribution under sections 181B.-01 to 181B.17. The amount certified by the commissioner shall be due and payable to the employees in the manner specified in section 181B.12 on the date that the employer ceases to operate its place of employment or a pension plan and shall be a lien upon the employer's assets. If the pension funding charge is not paid when due, the employer shall be liable for interest on the amount due at the rate of eight percent per annum until the charge and interest are paid, and the attorney general of this state shall bring action in an appropriate district court of this state or in the courts of another state or in an appropriate federal court as provided for in section 181B.13.

181B.12 PURCHASE OF PREPAID DEFERRED ANNUITY. The amount certified by the commissioner as due and payable to the employees shall be paid to the employees by the employer through the purchase of a prepaid deferred annuity payable to the employee when he reaches normal retirement age or to his beneficiary upon the employee's death. Such purchase shall be made through a trust authorized by the United States Internal Revenue Service to make such purchases in a manner which exempts from federal income taxation the money used to purchase the annuity and all income earned by such annuity up to the date of the distribution of the annuity amount. In no event shall the amount of annuity to be distributed at normal retirement age exceed the amount of the accrued normal retirement benefit.

181B.13 RECOVERY OF AMOUNTS DUE. The commissioner shall maintain a separate record of each employee owed a pension funding charge under sections 181B.01 to 181B.17. Ten days after any pension funding charge is due the commissioner shall tabulate all unpaid amounts and certify that figure to the attorney general who shall immediately take appropriate legal action as authorized in section 181B.11 on behalf of all aggrieved employees in a class action suit.

181B.14 ACTS CONSTITUTING TERMINATION. For the purposes of sections 181B.01 to 181B.17, the employment of any employee involuntarily terminated within one year of the date an employer ceases to operate a place of employment or a pension plan within this state, or within such longer period as prescribed by the commissioner when he determines that an employer is attempting to evade the provisions of sections 181B.01 to 181B.17, shall be deemed to have been termi-

nated because of the employer's ceasing to operate its place of employment or a pension plan, unless the employer can conclusively show that the termination was attributable to some other cause.

181B.15 RULES AND REGULATIONS. The commissioner may promulgate rules and regulations to provide for the efficient administration of the provisions of sections 181B.01 to 181B.17, or to clarify such provisions as may be necessary to effectuate the purposes of sections 181B.01 to 181B.17, and may from time to time specify any appropriate actuarial assumptions necessary to effectuate the purposes of sections 181B.01 to 181B.17.

181B.16 PROTECTION OF FUNDS FROM EXECUTION OR PROCESS. The funds of any employer which are set aside or reserved for benefits under a pension plan of the employer to which employees have a vested right shall not be liable to levy or attachment by virtue of any execution or civil process whatever, issued out of any court of this state, for the collection of the pension funding charge imposed by sections 181B.01 to 181B.17.

181B.17 EFFECTIVE DATE; EFFECT OF FEDERAL ACT IN AREA. Sections 181B.01 to 181B.17 shall take effect the day following final passage. Provided that sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States.

77-747

Supreme Court, U. S.
FILED
DEC 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

WALTER J. FLECK, *et al.*,

Appellants,

vs.

WARREN SPANNAUS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Statute Involved	2
Question Presented	2
Statement	2
Argument	6
The Lower Court's Decision Is Correct Under The Principles Of United States Trust Co. v. New Jersey And Presents No Substantial Question Not Previously Decided By This Court	6
I. The Lower Court Properly Interpreted And Applied This Court's Decision In United States Trust In Holding That The Minnesota Pension Act Did Not Unconstitutionally Impair Appellants' Private Contract Rights	7
II. Even Without The Distinction Between The Impairment Of Public And Private Contracts, The Minnesota Pension Act Is Necessary And Reasonable And Serves A Vital Public Purpose	12
A. The Act Is Directed To A Legitimate Public Purpose	12
B. The Necessity Of The Minnesota Pension Act Is Clear	14
C. The Method For Achieving The Minnesota Pension Act's Purposes Is Reasonable	16
Conclusion	20

TABLE OF AUTHORITIES

Cases: PAGE

Carmichael v. Southern Coal & Coke, 301 U.S. 495 (1937) 14
Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975) 16
El Paso v. Simmons, 379 U.S. 497 (1965) 8
Fleck v. Spannaus, —— Minn. ——, 251 N.W.2d 334 (1977) 14
Fleck v. Spannaus, 412 F. Supp. 366 (D. Minn. 1976) 2, 3
Helvering v. Davis, 301 U.S. 619 (1937) 14
Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934) 1, 8, 12, 13, 16
Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948), *cert. denied in part* 336 U.S. 960 (1949), *aff'd on other grounds* 339 U.S. 382 (1950) 16
Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967) 18
Manigault v. Springs, 199 U.S. 473 (1905) 11
Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) 14
New York Central R. R. v. White, 243 U.S. 188 (1917) 14
Stephenson v. Binford, 287 U.S. 251 (1932) 17
United States Trust Co. v. New Jersey, —— U.S. ——, 97 S. Ct. 1505 (1977) 1, 7, 10, 12, 14

Constitutional and Statutory Provisions:

U. S. Const. art. I, § 10, cl. 1 ..... 3, 6

PAGE

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 *et seq.* 12
Minnesota Private Pension Benefits Protection Act, Minn. Stat. § 181B.01 *et seq.* (1976) 2

Other Authorities:

H. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), Pension Reform Act, 1974 *U. S. Code Cong. and Adm. News* 288, 294 13
Hearings on Private Welfare and Pension Plan, Before Subcommittee on Labor of Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 736, 783 (June 3, 1972) 13
Note, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause, 125 U. Pa. L. Rev. 167 (1976) 11
S. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), Pension Reform Act, 1974 *U.S. Code Cong. and Adm. News* 508, 516 13

IN THE

Supreme Court of the United States

October Term, 1977

WALTER J. FLECK, *et al.*,

Appellants,

VS.

WARREN SPANNAUS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge federal district court for the District of Minnesota on the following grounds:

1. The decision of the district court is clearly correct under the principles recently enunciated by this Court in *United States Trust Co. v. New Jersey*, —— U.S. ——, 97 S. Ct. 1505 (1977) and the leading case of *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

2. There is no conflict of decision.

3. The question on which the decision of the cause rests is so unsubstantial as not to need further argument.

STATUTE INVOLVED

The Minnesota Private Pension Benefits Protection Act, Minn. Stat. ch. 181B (1976), is set forth in full at Appendix B to the Jurisdictional Statement of Appellants and is described in the district court's unreported opinion, which is contained in Appendix A to the Jurisdictional Statement.

QUESTION PRESENTED

Was the lower court correct in holding that the Minnesota Private Pension Benefits Protection Act, as it applies to the salaried employees pension plan of the Allied Steel Company, is valid under the Contract Clause of the United States Constitution?

STATEMENT

For many years Allied Structural Steel Company ("Allied Steel") maintained a Minnesota office which monitored the construction of steel buildings and bridges in 30 states.[1] *Fleck v. Spannaus*, 412 F. Supp. 366 (D. Minn. 1976). In December 1974, Allied Steel commenced the instant action against appellees, Warren Spannaus, the Attorney General of the State of Minnesota, and other Minnesota state officials[2] charged with enforcing the Minnesota Private Pension Benefits Protection Act ("Minnesota Pension Act"), Minn. Stat. ch. 181B (1976).

[1] By its Order of August 5, 1976, the three-judge federal district court herein ruled that all three individual plaintiffs (Fleck, Hamler and Richert) lacked standing to challenge the constitutionality of the Minnesota Pension Act and, therefore, dismissed them from the lawsuit. Consequently, Allied Steel now is the only real party in interest as appellant. It does not raise the validity of that dismissal before this Court.

[2] Appellees will be referred to as the State of Minnesota hereinafter.

Allied Steel sought summary judgment from a three-judge federal district court declaring that the Minnesota Pension Act was invalid under various state law theories and on constitutional grounds. Before issuing its decision on the constitutional issues, the three-judge court certified questions of state law[3] to the Minnesota Supreme Court and appointed a special master to make certain findings of fact.[4] The Minnesota Supreme Court subsequently ruled that the Minnesota Pension Act was applicable to Allied Steel. *Fleck v. Spannaus*, —— Minn. ——, 251 N.W.2d 334 (1977).

On April 7, 1977, the Special Master submitted his Findings of Fact to the lower court.[5] He found that as of June 30, 1974, Allied Steel's salaried employees pension plan had a net deficiency under its own terms of $295,341. He also concluded that there had been no earmarking of contributions to the pension fund for specific employees and that the possibility of closure of its Minnesota office was not one of the actuarial assumptions which had been used in developing Allied Steel's pension plan.[6]

Subsequently the district court held on September 2, 1977, that the Minnesota Pension Act was constitutional under the Contract and Commerce Clauses of the United States Constitution and under the Due Process and Equal Protection Clauses of the Constitution's Fourteenth Amendment.[7] In seeking to appeal that decision, Allied Steel now asserts as the sole basis for its appeal that the Minnesota Pension Act violates the Contract Clause, U. S. Const. art. I, § 10, cl. 1.

[3] *See* Minn. Stat. § 181B.17 (1976).

[4] *See* lower court opinion contained in Jurisdictional Statement at Appendix (hereinafter abbreviated as "App.") 1a-2a.

[5] All parties have stipulated to the Findings of Fact pursuant to Rule 53(e)(4) of the Federal Rules of Civil Procedure.

[6] Special Master's Findings of Fact at 3-7; *see also* App. at 5a-7a.

[7] App. at 13a-19a.

The Minnesota Pension Act was enacted on April 9, 1974. It protects accrued pension benefits of any Minnesota "employee" with ten or more years of employment by an employer maintaining a "place of employment" within Minnesota.[8] This protection is provided by requiring a Minnesota employer who terminates a Minnesota place of employment or pension plan to pay a pension funding charge if such action results in the forefeiture of pension benefits. The pension funding charge, which is fundamentally an amount equal to benefits that the employees accrued under the pension plan, is paid by the employer's purchase of prepaid, deferred annuities payable to the protected Minnesota employees upon retirement age as set forth in the pension plan or to the employees' beneficiaries upon the employees' death. Minn. Stat. § 181B.12 (1976).[9]

The Allied Steel Salaried Employees' Pension Plan was established on August 7, 1963, and has been in existence continuously since that date. The plan is for the benefit of salaried employees, none of whom are unionized. It has been qualified as a single-employer plan under the Internal Revenue Code § 401.[10]

Under the pension plan, a salaried employee is entitled to full vesting of his pension for early retirement purposes if: (1) he has worked fifteen continuous years and has attained the age of 60; or (2) after he has attained the age of 55 and has worked 20 continuous years, or a lesser number

[8] For definitions of the relevant terms used in the Minnesota Pension Act, see Minn. Stat. § 181B.02 (1976).

[9] The Minnesota Pension Act has been preempted by ERISA, 29 U.S.C. § 1144(a); however, the preemption did not take effect until January 1, 1975, and does not apply to any cause of action accruing prior to that date. Fleck v. Spannaus, 412 F. Supp. 366 (D. Minn. 1976); Fleck v. Spannaus, —— Minn. ——, 251 N.W.2d 354 (1977).

[10] Fleck v. Spannaus, 412 F. Supp. 366, 368 (D. Minn. 1976).

of continuous years of service, which when added to his age equals the sum of 75; or (3) before reaching age 55, he has at least 25 or more years of continuous service such that the sum of his age and continuous years of service equal 80.

On July 31, 1974, Allied Steel ceased operations in Minnesota and eleven employees at the division were terminated.[11] At least nine of these employees had been employed by Allied Steel for more than ten years prior to their termination but had not reached retirement age under the Pension Plan. Since mandatory ten-year vesting under ERISA[12] was not effective until January 1, 1976, the nine Minnesota employees do not receive any accrued benefits under the Pension Plan or through federal insurance under ERISA. The only protection of accrued pension benefits available to the Minnesota employees is that protection provided by the Minnesota Pension Act. *See Fleck v. Spannaus*, —— Minn. ——, 251 N.W.2d 334, 338-39 (1977).

In September 1974, pursuant to the Minnesota Pension Act, Allied Steel notified the Minnesota Commissioner of Labor and Industry of its intention to cease the operation of its place of employment in Minnesota. Thereafter, when it became apparent that the State of Minnesota intended to enforce the Minnesota Pension Act and the funding charge thereunder against Allied Steel,[13] the company commenced an action for declaratory and injunctive relief. That action has led to Allied Steel's appeal to this Court.

[11] This termination was begun subsequent to the effective date of the Minnesota Pension Act.

[12] ERISA is the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

[13] On August 18, 1975, the State of Minnesota notified Allied Steel of the assessment of a pension funding charge of $185,751. At Allied Steel's request, an administrative hearing was granted to determine the accuracy of the funding charge. This hearing has been held in abeyance pending the outcome of the litigation.

ARGUMENT

THE LOWER COURT'S DECISION IS CORRECT UNDER THE PRINCIPLES OF UNITED STATES TRUST CO. v. NEW JERSEY AND PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Allied Steel presses only one claim as a basis for seeking appeal to this Court. It alleges that the Minnesota Pension Act is invalid under the Contract Clause, U.S. Const. art. I, § 10, cl. 1. As noted by the lower court herein, the specific contracts claimed to be impaired by the Minnesota Pension Act are:

> . . . (1) [T]he employment agreements entered into by Allied and its employees, and (2) the trust agreement between Allied and the trustee of its pension plan. The terms of the employment agreements included wage rates, working conditions and fringe benefits, one of which was a pension plan with vesting to occur after twenty years. The Pension Act allegedly impairs those agreements in that it *requires vesting of pension benefits after ten years if Allied ceases to do business or substantially reduces its work force in Minnesota. The terms of the trust agreement* require payment by Allied in accord with actuarial projections which *are predicated on vesting after twenty years.* The Pension Act allegedly impairs that agreement because Allied must incur additional expense to provide benefits for persons whose benefits would be forfeited by plant closure.

(App. at 8a-9a, emphasis added.)

Allied Steel contends that the Minnesota Pension Act is invalid because it holds Allied liable for accrued pension benefits prior to the time such benefits would vest under its private pension plan. Such liability, however, arises only if any employer: 1) ceases to operate a place of employment or private pension plan in Minnesota, and 2) if such cessation results in the loss of employee pension benefits which had been covered by the plan.

The Minnesota Pension Act, however, is in accord with the Contract Clause decisions of this Court since it is a legitimate exercise of Minnesota's police power to protect vital interests of its residents and is both reasonable and necessary to achieve that purpose.

I. The Lower Court Properly Interpreted And Applied This Court's Decision In United States Trust In Holding That The Minnesota Pension Act Did Not Unconstitutionally Impair Appellants' Private Contract Rights.

In sustaining the constitutionality of the Minnesota Pension Act, the three-judge district court relied heavily on this Court's recent decision in *United States Trust Co. v. State of New Jersey*, —— U.S. ——, 97 S.Ct. 1505 (1977).

United States Trust involved a 1962 statutory convenant between New York and New Jersey and certain bondholders which had expressly provided that none of the revenues or reserves which were security for Port Authority bonds would be used to finance certain rail transit expenditures without the bondholders' consent. A 1974 New Jersey repealer statute[14] allowed the states to apply revenues from the pre-

[14] New York had also passed a statute parallel to the 1974 New Jersey law.

existing bond securities to the construction of the previously prohibited transit facilities. This Court concluded that the impairment of the bondholders' rights under the 1962 covenant was unconstitutional under the Contract Clause.

In reaching that conclusion this Court expressly relied on its decisions in *El Paso v. Simmons*, 379 U.S. 497 (1965) and *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), and the tests enunciated in those cases for resolving Contract Clause challenges. 97 S. Ct. at 1514. As developed hereinafter, those tests require a determination of whether there is an impairment of a contract obligation and, if so, whether such impairment is for a legitimate public purpose and is both reasonable and necessary. 97 S. Ct. at 1515, 1521-1523.

The lower court held that even though Allied Steel's obligations under its pension plan were impaired, that impairment was unsubstantial for Contract Clause purposes. This holding was based, in part, on the stipulated finding that Allied Steel is not burdened by an unanticipated liability. App. at 6a. Since the possibility of closure of the Minnesota plant was not a contingency considered in developing the pension plan, Allied Steel's claim that its contributions to the plan were carefully determined on certain actuarial assumptions was unfounded. The lower court concluded that:

> . . . [W]hile the [early] date of payment [of employee pensions] could not be anticipated, the likelihood of payment was, as was the need to accumulate a reserve for that purpose.[15]

Thus, the lower court properly held that, in light of the Minnesota Pension Act's clear public purpose of providing economic protection to the elderly and the concomitant benefit to the overall state welfare, the *extent* of the Minnesota Pension Act's effect on Allied Steel was not violative of the Contract Clause. App. at 8a.

[15] App. at 7a.

Furthermore, the lower court took note of this Court's position in *United States Trust* that the tests of a statute's necessity and reasonableness should be applied less stringently to ". . . general regulatory legislation impairing a range of private contracts" than to statutes impairing ". . . a particular contract to which the state was a party." App. at 3a.

As the *United States Trust* Court observed:

> The states must possess broad power to adopt general regulatory measures without being concerned that *private contracts* will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements.
>
> . . .
>
> Yet private contracts are not subject to unlimited modification under the police power. . . . As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> . . .
>
> As with laws impairing *private contracts*, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard [to the instant case involving a *public contract*], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate *because the State's self-interest is at stake.*

97 S. Ct. at 1517-20 (emphasis added and citations omitted).

The *United States Trust* Court, by analogy, compared the public and private contracts distinction to the "dual standard" this Court has applied under the Fifth Amendment in reviewing federal laws which retroactively abrogate the government's obligations under federal bonds to redeem the bonds at specified values. It observed that legislation interdicting private contracts would be viewed with less scrutiny than laws abolishing Congress' own contractual obligations, and that the extent of the limitations on the exercise of a state's reserved police powers to impair contracts depended upon the "nature of the contractual relationship." 97 S.Ct. at 1517-1520 and n. 25.

The public-versus-private contracts distinction in Contract Clause cases is rationally based on several key points. First, it is beyond dispute that all statutory impairments of contracts are not, *ipso facto*, unconstitutional, and this Court has made it clear that the judiciary must give great deference to the sovereignty of the states and their legislative enactments which impair contract obligations, so long as those impairments are reasonable and necessary to a legitimate public purpose. *See United States Trust Co. v. New Jersey, supra*, 97 S. Ct. at 1517; *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 434-435 (1934).

Second, it is logical to apply the reasonable-and-necessary test more strictly in a case where the contractual relationship is public in nature, *i.e.* where the state, as in *United States Trust* is one of the contracting parties. In such a circumstance it is likely that in enacting a statute which abrogates or impairs its own contracts[16] a state legislature might be motivated more by its own self interest than by the general public welfare. Conversely, states should be granted more deference and flexibility in passing statutes which incidentally impair a number of private contractual relationships when such statutes are reasonably directed to a problem of clear public importance.

Where a state law impairs purely private contract rights, it is more likely to be within the realm of legitimate police powers than a law which is arbitrarily directed at a specific public contract. *See Manigault v. Springs*, 199 U.S. 473 (1905); App. at 3a; Note, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. Pa. L. Rev. 167, 187-196 (1976). As the lower court ruled herein, the standard test of reasonableness and necessity should be applied less strictly where private contracts are affected as opposed to cases involving public contracts. Thus, the lower court's holding that the Minnesota Pension Act does not unconstitutionally impair Allied Steel's contract rights as embodied in its salaried employees pension plan is unquestionably in full accord with this Court's decision in *United States Trust*.

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[16] One of the main reasons for the invalidation of the 1974 New Jersey law was this Court's belief that the mass transit problems to which the 1974 act was directed were clearly foreseeable by the New Jersey legislature prior to and at the time of the 1963 statutory covenant. 97 S.Ct. at 1509-1512, 1522-1523. It simply is not generally reasonable for a party (*i.e.*, a state) to a public contract to alter or abrogate unilaterally the terms of its own contract when the basis for such changes were known to or foreseeable by that party at the time of entering into the contractual relationship.

II. Even Without The Distinction Between The Impairment Of Public And Private Contracts, The Minnesota Pension Act Is Necessary And Reasonable And Serves A Vital Public Purpose.

It is apparent from the facts in the instant case that, regardless of any distinction between public and private contracts, the Minnesota Pension Act 1) is directed to an obvious and legitimate public purpose, 2) is reasonable and 3) is necessary. It is well settled that if a statute meets the foregoing three standards, it will be upheld as constitutional despite its effect on private or public contracts. *United States Trust, supra*; *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934).

A. The Act Is Directed To A Legitimate Public Purpose.

Allied Steel contends that the alleged uniqueness of the Minnesota Pension Act and its lack of legislative recitals regarding the public objectives of the statute somehow establish that the Act does not serve a public purpose.[17] That claim is without merit.

First, a statute's uniqueness *per se* certainly does not deprive it of a valid purpose. Rather, it may mean, as it does in the instant case, that the statute merely represents the first attempt by a particular legislative body to deal with a serious public problem. Allied Steel's theory of uniqueness would place the efficacy and legitimacy of many laws in jeopardy. *E.g.* Employee Retirement Income Security Act of 1974. 29 U.S.C. §§ 1001 *et seq.*[18]

[17] Jurisdictional Statement at 6.

[18] Indeed, ERISA is far more comprehensive in terms of its effects on private contracts than the Minnesota Pension Act. Thus, the Minnesota statute is not the unique law portrayed by Allied Steel.

Second, the hardships suffered by persons whose retirement plans have been shattered by inadequately funded private pension plans and broken pension promises have been so well publicized in recent years[19] that the lack of the Minnesota Pension Act's express recitals thereto is irrelevant. *See Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 444 (1934). The statute on its face is directed to the protection of the economic welfare of senior citizens by assuring them the receipt of earned and expected pension benefits and, consequently, is within the broad police power of the state of Minnesota.[20] Indeed, the forfeiture of anticipated pensions because of inadequately funded plans is particularly devastating since it generally affects persons at an age when they frequently have no other source of income beyond Social Security and are normally too old or infirm to reenter the labor market. See district court opinion, App. at 10a n. 6. As a result, the loss of

[19] *See, e.g.*, the committee reports supporting the Congressional bills leading to the enactment of ERISA, S. Rep. No. 93-383, 93rd Sess. (1974), Pension Reform Act, *U. S. Code Cong. and Adm. News* 508, 516 (1974); Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), Pension Reform Act, *U. S. Code Cong. and Admin. News* 288, 294 (1974); Hearings on Private Welfare and Pension Plans, Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 736, 783 (June 3, 1972).

[20] Allied Steel asserts that the Contract Clause is meaningless under the public purpose test, since a state "can always assert" an allegedly strong public purpose for any statute and, thus, easily overcome the provisions of private contracts. Appellants, however, misunderstand the application of the public purpose test. *See* Jurisdictional Statement at 6. First, the issue of whether a statute serves a *legitimate* public purpose must be reviewed on the facts of each case. Certainly, *every* legislative enactment is not directed to a broad public purpose sufficient to overcome a Contract Clause challenge. Second, as noted hereinabove, statutes must also be reasonable and necessary in their approaches to achieving a given public purpose. Thus, a finding of a valid public purpose is only one facet of a court's review of a challenged statute.

pension income can result in the inability to maintain adequate housing, clothing or nutrition.[21]

The state interest in assuring adequate income to the elderly has been recognized by this Court. *See Helvering v. Davis*, 301 U.S. 619 (1937); *see also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). The public purpose of the Minnesota Pension Act, in particular, has been noted by the Minnesota Supreme Court during another stage of the proceedings of the instant case. *Fleck v. Spannaus*, —— Minn. ——, 251 N.W. 2d 334, 336, 338-340.

B. The Necessity Of The Minnesota Pension Act Is Clear.

One means for determining the necessity of the Minnesota Pension Act is to measure it against alternative methods for achieving the same public purposes. *See United States Trust*, 97 S.Ct. at 1522.

In *United States Trust*, for example, this Court found the 1974 New Jersey repealer statute unnecessary, in part, because the statute's objectives, *i.e.* reducing automobile use and improving mass transit could be accomplished by other acceptable means such as imposing state taxes on vehicle miles traveled in the Port Authority area, increased commuter tolls and increased gasoline taxes. 97 S. Ct. at 1522.

As alternatives in the instant case, Allied Steel, citing ERISA, asserts 1) that the Minnesota statute should apply its pension vesting and entitlement requirements only prospectively and 2) permit companies to terminate their pension plans during a grace period before the statute becomes effective. Jurisdictional Statement at 11. But, as the lower court properly noted, these suggestions are not truly alternatives to the valid public purposes for which the Minnesota Pension Act was necessary:

> . . . [T]he Minnesota legislature rejected both of these alternatives because either would have been inconsistent with the Act's central purpose—to assure some measure of retirement income to those affected by present plan[t] closures and plan terminations. Although the legislature might have adopted a less drastic means to accomplish its purpose, the approach it chose is not unreasonable or arbitrary merely because it requires funding to commence from the date of enactment.

App. at 12a-13a.[22]

The necessity of the Minnesota Pension Act is substantially greater than the need for the statute at issue in *United States Trust*. There, this Court ruled that one reason for holding the statute in question unnecessary under Contract Clause analysis was that the law's *total repeal* of the prior statutory covenant was not essential to its objectives. 97 S.Ct. at 1522. The Minnesota Pension Act, however, constitutes a very limited step in dealing with the critical problems caused by inadequately funded pension plans, since it applies only to employers who terminate their places of employment or their pension plans and whose plans are inadequately funded. Thus,

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[21] Furthermore, the mass forfeiture of retirement benefits that the Minnesota Pension Act seeks to prevent can result in adverse consequences for the surrounding community through reduced purchasing power and an increased demand for welfare funds and related public services.

[22] Allied Steel's contention that ERISA affects vesting requirements only prospectively is incorrect. Three alternative vesting requirements are provided by ERISA, and each of them to some extent can have a retroactive effect on plans, like Allied Steel's, which are underfunded. *See* 29 U.S.C. §§ 1053(a)(2)(a), 1053(a)(2)(B) and 1053(a)(2)(C).

the act is designed to prevent the forfeiture of accrued pension benefits by a substantial number of employees. Surely the Minnesota Pension Act not only is far more necessary to its objectives than the statute reviewed in *United States Trust*, but also is the only effective method for achieving its demonstrable public purposes.

C. The Method For Achieving The Minnesota Pension Act's Purposes Is Reasonable.

Since only employees with ten or more years of credited service are covered by the Minnesota Pension Act, an employer subject to liability would already have received the primary benefits of a significant period of productive service from employees to whom benefits would be payable under the Act. The employer also would have enjoyed the tax benefits for contributions previously made to the pension plan. In preventing the forfeiture of anticipated pension benefits, the Minnesota Pension Act simply insures that the employee receives the deferred compensation he worked for and expected in this retirement years.[23]

A common formulation of the test of reasonableness was expressed by this Court in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934):

[23] To the extent that the problems of inadequate private pensions were foreseeable, it is noted that the Minnesota Pension Act represents the first attempt by the Minnesota legislature to provide a meaningful response to those problems. Certainly, there is no evidence herein that the employees of Allied Steel had any expectation that they would not receive their full pensions. *See* Craig v. Bemis Company, 517 F.2d 677, 680 (5th Cir. 1975) and Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 249-50 (7th Cir. 1948), *cert. denied in part* 336 U.S. 960 (1949), *aff'd on other grounds* 339 U.S. 382 (1950), where the courts found that both employers and employees regard pensions as deferred compensation, and each *expects* such promised future benefits to attract and keep employees.

> The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and *the measures taken are reasonable and appropriate to that end.*

290 U.S. at 438 (emphasis added). Similarly, in *Stephenson v. Binford*, 287 U.S. 251, 272 (1932) this Court stated:

> The extent to which . . . they [statutory provisions] conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought . . . are matters addressed to the judgment of the Legislature, ... *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the* [statute's] *means and the end.*
>
> (Emphasis added.)

Under the foregoing tests, the lower court's finding that the Minnesota Pension Act was a reasonable exercise of the state's police power is well founded. The application of the Act arises only when pension benefits have been forfeited as a result of a private pension plan termination or the cessation of operation of a place of employment in Minnesota. Furthermore, it imposes liability on an employer only with respect to employees with 10 or more years of covered service and only to the extent the pension fund is inadequate to cover the benefits promised under the pension plan. *See* Minn. Stat. §§ 181B.02, subds. 6, 10, 11, 12 and 16 and 181B.03-.07 (1976).

Allied Steel's claim that the Minnesota Pension Act is unreasonable because it allegedly imposes actuarially unanticipated liability on the company is without merit. *See* Jurisdic-

tional Statement at 10-11. In essence, the company asserts that its contributions to the pension plan were actuarially determined based on the anticipation that only a limited number of participants would ever actually qualify for pension benefits because of the stringent vesting provisions of the Pension Plan. Such a theory is inapposite to plant shut-downs covered by the Minnesota Pension Act. The lower court's conclusions in this regard are well supported by the Special Master's Findings that Allied Steel's actuarial assumptions in planning its pension program were *not* based on the possibility of plant closure.[24] Indeed, the forfeiture of pension benefits resulting from the cessation of operations of a place of employment, such as are covered by the Minnesota Pension Act, may actually provide a windfall to the employer at the expense of the terminated employees. *See* lower court opinion, App. at 6a; *Lucas v. Seagrave Corp.*, 277 F.Supp. 338, 345 (D. Minn. 1967). Accordingly, imposing liability on the employer to prevent the forfeiture of those employees' benefits can hardly be said to be irrational or oppressive.

Moreover, it is reasonable to extend the protection afforded by the Minnesota Pension Act to previously-accrued benefits, because to apply its protection only to those benefits earned after its passage would have rendered the Act ineffectual until many years after enactment. To limit the application of the Minnesota Pension Act to benefits earned subsequent to enactment would mean that a 20 year employee whose employment was terminated due to a plant shutdown one year

[24] *See* App. at 5a-7a. The transcription of the lower court's opinion at App. 5a is in error. The actual opinion stated that: "In this regard, Allied contends that the impairment is substantial because the Pension Act burdens employers with pension obligations that were *not* actuarially anticipated." The emphasized word was omitted from the Appendix.

after the passage of the Minnesota Pension Act, would still forfeit nineteen years of accrued pension benefits, with the state law protecting only one year of benefits. It was not unreasonable for the legislature to choose a method of protection that avoided such a virtually total emasculation of the purpose of the Minnesota Pension Act.[25] Consequently, there is no merit to the contention that the application of the Minnesota Pension Act to benefits accrued prior to its passage is unreasonable.

[25] Congress chose a similar course in ERISA. For example, the minimum vesting standards apply with respect to years of service prior to enactment. 29 U.S.C.A. § 1053(b)(1) (1975). Similarly, ERISA termination insurance protects benefits accrued prior to passage, and even applies retroactively to some plan terminations that occurred prior to passage. 29 U.S.C.A. §§ 1322 and 1381(b)(2) (1975)

CONCLUSION

The lower court's holding that the Minnesota Pension Act is a necessary police power statute reasonably directed to the achievement of a legitimate public purpose is obviously correct under principles delineated by this Court. Furthermore, there is no conflict of decision and, thus, no substantial question not previously decided by this Court. Therefore, this Court should dismiss Allied Steel's appeal or, in the alternative, affirm the decision of the three-judge federal district court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1977

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FOR THE DISTRICT OF MINNESOTA.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Provision of the Constitution Involved	2
Statutes Involved	2
Question Presented	2
Summary of the Case	3
Summary of Argument	6
Argument	8
The Minnesota Act Violates the Contracts Clause Because It Retroactively Changes the Provisions in Allied's Contracts Which Control the Vesting and Funding of Pensions	8
A. The Majority and the Dissenting Opinions in *United States Trust*, and the History of Contracts Clause Jurisprudence All Show That States Cannot Impair Private Contracts More Easily Than They Can Impair Public Contracts	8
B. The Minnesota Act, by, in Effect, Retroactively Forcing All Pensions to Vest in Ten Years and Retroactively To Be Funded Therefor, Rather Than in Substantially Longer Periods, Drastically Impaired the Express Substantive Terms and Obligations of Allied's Contracts to an Extent That Could Not Have Been Anticipated	12
C. The Minnesota Act Is Not Reasonable and Necessary to Serve an Important Public Goal	16
Conclusion	19
Appendices	
Allied Structural Steel Salaried Employees' Pension Plan (as Amended and Effective at the Time the Minnesota Act Was Adopted)	1a
Allied Salaried Employees' Pension Trust	18a

Table of Authorities.

Cases.

Alexander Champion and Thomas Dickason v. Silas Casey (C. C. D. R. I. 1792) 10

Church Land Cause (C. C. D. Vt. 1799) 10

Fleck v. Spannaus, 412 F. Supp. 366 (D. Minn. 1976) .. 1, 5

Fleck v. Spannaus, 421 F. Supp. 20 (D. Minn. 1976) 1

Fleck v. Spannaus, ... Minn. ....., 251 N. W. 2d 334 (1977) 1, 5

Fletcher v. Pech, 6 Cranch (10 U. S.) 87 (1810) 10, 11

Grimball v. Ross, T. U. P. Charlt. 175, 180-81 (Ga. Super. Ct. 1808) 10

Holmes v. Lansing, 3 Johns 73 (N. Y. 1802) 10

Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934) 6, 15, 16

J. I. Case Co. v. NLRB, 321 U. S. 332 (1944) 15

Murray v. Charleston, 96 U. S. 432 (1877) 16

Raybestos-Manhattan, Inc. v. Glaser, 144 N. J. Super. 152, 365 A. 2d 1 (1976) 17

United States Trust Co. v. State, 134 N. J. Super. 124, 338 A. 2d 833 (1975), *aff'd* 69 N. J. 253, 353 A. 2d 514 (1976), *rev'd* 431 U. S. 1 (1977) 17

United States Trust Company v. New Jersey, 431 U. S. 1 (1977) 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19

White Motor Corporation v. Malone, 545 F. 2d 599, *on appeal as* No. 76-1184.....6,15

Constitutional and Statutory Provisions.

U. S. Const., art. I, § 10, cl. 1 .....2, 5, 6, 8, 9, 10, 11, 16

Employee Retirement Income Security Act of 1974, P. L. 93-406, 88 *Stat.* 829 .....4, 5, 7, 18, 19

Minnesota Private Pension Benefits Protection Act, *Minn. Stat.* § 181 B.01 *et seq.* (1974), Laws 1974, chp. 437 .....2, 4, 6, 20

28 U. S. C. § 1253 (1966) 2

28 U. S. C. § 1404 (1976) 5

Other Authorities.

120 Cong. Rec. (1974) 4, 5

134 Cong. Rec. (daily ed., Aug. 4, 1977) 19

Elliot's *Debates on the Adoption of the Constitution* 10

The Federalist (Jacob E. Cooke, ed. 1961) 10

Greenblatt, Joel; Pension Benefit Guaranty Corporation, Telephone Interview Nov. 17, 1977 19

H. R. Rep. No. 533, 93d Cong., 1st Sess. (1973) 18

U. S. Dep't of Commerce, *1976 Statistical Abstract of the United States* 17

Warren, *The Making of the Constitution* (1928) 10

Warren, *The Supreme Court in United States History* (1926) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747.

WALTER J. FLECK, ET AL.,

Appellants,

vs.

WARREN SPANNAUS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

BRIEF OF APPELLANT, ALLIED STRUCTURAL STEEL COMPANY.

OPINIONS BELOW.

The judgment of the District Court is not yet reported. It is printed at J. A. A-67.

Earlier opinions in this case or that certified by the District Court to the Supreme Court of Minnesota are reported as follows:

1. Order convening three-judge court	412 F. Supp. 366 (D. Minn. 1976)
2. Order certifying questions of state law to the Minnesota Supreme Court	421 F. Supp. 20 (D. Minn. 1976) (J. A. A-56, A-65)
3. Opinion of the Minnesota Supreme Court	..... Minn. ....., 251 N. W. 2d 334 (1977)

JURISDICTION.

Appellant sued to enjoin the enforcement of the Minnesota Private Pension Benefits Protection Act as being unconstitutional. J. A. A-1. A three-judge court entered a judgment on September 2, 1977, J. A. A-67, A-85, which it revised on September 21, 1977, J. A. A-86, denying the injunction and upholding constitutionality. Appellants filed a Notice of Appeal on September 27, 1977, J. A. A-89; a Jurisdictional Statement on November 25, 1977. On January 23, 1978, the Court noted probable jurisdiction. Jurisdiction is conferred by 28 U. S. C. § 1253.

PROVISION OF THE CONSTITUTION INVOLVED.

U. S. Const. Art. I, § 10, cl. 1 states, in relevant part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

STATUTE INVOLVED.

The Minnesota Private Pension Benefits Protection Act, *Minn. Stat.* § 181 B.01 *et seq.* (1974), Laws 1974, ch. 437, is printed at J. A. A-90.

QUESTION PRESENTED.

Do states have greater latitude under the Contracts Clause of the Constitution to impair the obligation of private contracts than those of public bodies?

STATEMENT OF THE CASE.

This appeal challenges the constitutionality of a Minnesota statute which, in effect, changed the substantive terms of pension agreements between a company and its employees.

The company, appellant Allied Structural Steel ("Allied"), operated an office in Minnesota, employing thirty people. J. A. A-40, A-41. In August, 1963, Allied instituted a pension plan for its employees. J. A. A-39. Contributions to the trust, all of which were made by Allied, were made to the trust which was the funding mechanism of the plan and were neither earmarked for, nor allocated to, specific employees but, instead, were paid in a gross amount that actuaries calculated to be sufficient to meet the obligations of the contract to the covered group. J. A. A-39, A-68, A-71, A-72. The actuaries assumed that, for various reasons, not all employees would remain in Allied's employment long enough for their benefits to vest. J. A. A-72. These reasons included, for example, death and loss of job; they neither expressly included nor expressly excluded Allied's closing a plant. J. A. A-68, A-72, A-73. The pension plan contained no promise Allied would keep it in effect for any period and included a provision permitting Allied to terminate it and prescribing how the assets of the pension trust would be allocated to various classes of employees. See § 14 at 13a-14a, Appendix, *infra*, Art. IX at 26a, Appendix, *infra*. (The full plan does not appear in the Joint Appendix but was submitted to the court on oral argument. *See* J. A. A-40. Full copy appears as an Appendix to this brief.) Under the plan, an employee's benefits vested if:

1) the employee has worked fifteen continuous years and attained the age of 60; or
2) was 55 or older and his age added to his years of continuous service totaled at least 75; or
3) was younger than 55, and his age added to his years of continuous service totalled at least 80. J. A. A-40, A-44.

Thus, if an employee began working for Allied at age 26, his retirement benefits would vest when he reached age 53.

On April 10, 1974, the Minnesota legislature enacted the Minnesota Private Pension Benefits Protection Act ("Act"), *Minn. Stat.* § 181 B.1 *et seq.*, which provided in essence that if an employer closed a plant in Minnesota he would owe his employees a "pension funding charge" for all years of service of 10 or more that were not vested under the employer's plan. The "charge" would be used to purchase paid-up annuities payable to the affected employees when they reached retirement age. *Minn. Stat.* § 181 B.12, J. A. A-101.

In effect, this imposed guaranteed, retroactive, vested pension benefits after 10 years of service. Under the Act, if employees began working for Allied at age 26, their retirement benefits would vest at age 36—seventeen years earlier than under their contracts with Allied. (A special master later determined that, to meet the statutorily imposed provisions, Allied would have to pay from $114,171 to $185,751 more than it had contracted to pay. J. A. A-68.)

The Act contained a so-called "self-destruct" provision (*Minn. Stat.* § 181 B.17, J. A. A-102) that it was to become "null and void" upon "institution" of a federal law guaranteeing the payment of a substantial portion of an employee's vested pension benefits. In fact, on February 28, 1974, seven weeks before the Minnesota Act was passed, the United States House of Representatives already had passed its version of what became the Employee Retirement Income Security Act of 1974 ["ERISA"]. 120 Cong. Rec. 4781-82 (1974). On March 4, 1974, over a month before the Minnesota Act was passed, the Senate had passed its version and selected members to meet with representatives of the House in conference. *Id.* at 5011. The House selected its conferees on April 2, eight days before the Minnesota Act was passed. *Id.* at 9286. The Conference Committee reported to the House on August 12 (*id.* at 27708) and to the Senate on August 13 (*id.* at 27997). Within 10 days, both

Houses passed ERISA (*id.* 29215-16, 29963). The President signed the bill on September 2, 1974.

Sometime after the Minnesota Act was passed, Allied began to phase out its Minnesota office. Minnesota then sought to enforce the early-vesting provisions of its Act against Allied. J. A. A-41, A-42, A-47.

Allied and the fiduciaries of its pension plan brought suit in the Northern District of Illinois to have the Minnesota Act declared unconstitutional and its enforcement enjoined. J. A. A-1. The suit was transferred to the District of Minnesota under 28 U. S. C. § 1404.

The United States District Court for the District of Minnesota convened a three-judge court. 412 F. Supp. 366 (1976). It certified several state-law questions to the Minnesota Supreme Court, J. A. A-65, but the answers of that court left the federal constitutional questions dispositive. (*Fleck* v. *Spannaus*, ... Minn. ....., 251 N. W. 2d 334 (1977)).

In the proceedings here Minnesota conceded that it impaired Allied's contracts with its employees. J. A. A-71. Nevertheless, the District Court held the Act constitutional because of the "considerable deference" it believed must be accorded state legislation impairing private, as distinguished from public, contracts. It held that what was taught in *United States Trust Company* v. *New Jersey*, 431 U. S. 1 (1977), enforcing the Contracts Clause, was limited to protection of public contracts and is not applicable to private contracts and that in any event the reformed contracts were not "significantly beyond the parties' initial expectations." J. A. A-74.

Allied appealed, and this Court noted probable jurisdiction on January 23, 1978.

SUMMARY OF ARGUMENT.

The Court has so recently and thoroughly considered the Contracts Clause in *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977), and currently is examining the Minnesota Private Pension Benefit Protection Act in *White Motor Corporation* v. *Malone*, No. 76-1184, that a brief fully detailing the cases under the Contracts Clause or fully exploring the Minnesota Act and its remaking of contracts would be redundant.

Therefore, the emphasis of this brief is directed to the fallacious theories by which the opinion below sought to escape *United States Trust*: that private contracts are entitled to less protection under the Contracts Clause than public contracts and that employers and employees reasonably "anticipated" that full pensions would be paid despite the limitations and the termination clauses of the Plan.

The Minnesota Act forces Allied retroactively to spend money to fulfill new pension contracts which the legislature created. This impairment goes far beyond that upheld in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934), for there, the impairment merely delayed the foreclosure process and required the payment to the mortgagee of rent during the enforcement proceedings. In this case, the core of the basic undertaking is changed by Minnesota to cast vast retroactive liabilities on the employer and confer benefits on employees far beyond those they had a right to expect under their contracts. The District Court's assertion that such a remade contract was within the reasonable expectations of the parties is without rational support.

Further, although the District Court asserts that the Minnesota Act takes money away from pension plan employers to help a minor segment of "senior citizens", it is apparent that

if Minnesota can do that, it can invade or re-make contracts concerning any citizen or group of citizens, for the aid of any other identifiable group of citizens, can exercise its force to alleviate any group of citizens whose contracts have proven not so fortunate as they originally may have thought. Finally, the unreasonability of the Act is shown by comparing it with the Employee Retirement Income Security Act of 1974, P. L. 93-406, 88 *Stat.* 829 ["ERISA"]. Unlike the Minnesota Act, ERISA did not force any employers to change their contracts with their employees.

ARGUMENT.

THE MINNESOTA ACT VIOLATES THE CONTRACTS CLAUSE BECAUSE IT RETROACTIVELY CHANGES THE PROVISIONS IN ALLIED'S CONTRACTS WHICH CONTROL THE VESTING AND FUNDING OF PENSIONS.

A. The Majority and the Dissenting Opinions in United States Trust, and the History of Contracts Clause Jurisprudence All Show That States Cannot Impair Private Contracts More Easily Than They Can Impair Public Contracts.

In *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977), the Court held that the Contracts Clause forbade New Jersey's altering its own contract. The Court stated that the Clause has an "important place in our constitutional jurisprudence" (*id.* at 15) and that "its limitation on state power was [not] illusory" (*id.* at 16). There is nothing in the opinions in *United States Trust* limiting their teachings to public, as distinguished from private, contracts.

However, the decision at bar limits *United States Trust* only to impairments of public contracts, holding that "policy judgments" of state legislators, converted into legislation to impair private contracts, are entitled to "considerable deference", even if the legislation throws uncontracted-for basic burdens on one party and emoluments on the other. J. A. A-69, A-70, A-75.

The theory that private contracts are less protected by the Constitution than public contracts, or, stated another way, that legislation impairing private contracts is to be reviewed with less scrutiny than that impairing public contracts has not heretofore been the law. The theory was arrived at only by placing

into one context language from *United States Trust* used in two divergent contexts.[1]

The first two sentences of the District Court's quotation (see footnote) are from a section of this Court's opinion discussing the general subject of a state's regulatory power (431 U. S. at 22). The third sentence of the quotation is taken from a section of this Court's opinion dealing with the constitutionality of a state's changing its own financial obligations (*id.* at 25-26). These sentences, separated by three pages in the Official Report, were juxtaposed or melded by the District Court without a hint that they dealt with different subjects. In the final quoted sentence, this Court, which had discussed the theory of inalienable sovereignty, was explaining why that theory did not apply to the security provision in *United States Trust*. This paragraph, in context, in the Opinion in *United States Trust*, distinguished

1. The District Court opined:

"In assessing the bondholders' Contract Clause challenge, the Supreme Court began by drawing an important distinction between general regulatory legislation impairing a range of private contracts and legislation abrogating a particular contract to which the state was a party. As to the former, the Court acknowledged that a more relaxed standard of review must apply; but when the state itself was a party, it conceded that complete deference to the legislature's judgment was inappropriate.

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. * * * As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> * * * *
>
> In applying this standard [to the instant case], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.

United States Trust Co. of New York v. *New Jersey, supra* at 52 L. Ed. 2d 109-110, 122." J. A. A-69, A-70.

between a state's financial contracts and a state's other contracts. Thus, the District Court, by placing this sentence next to those three pages earlier in this Court's opinion, changed the distinction to one between a state's contracts and private contracts. In so doing, the District Court invented a standard of review which reversed history and all legal teaching.

The Framers clearly intended the Contracts Clause to protect the stability of private contracts. Edmund Randolph, in the Virginia Convention which ratified the Constitution, argued that the Contracts Clause was essential because it prevented "interferences of the State Legislatures with private contracts." Warren, *The Making of the Constitution* at 555 (1928), quoting 3 Elliot's *Debates on the Adoption of the Constitution* 478-79. James Madison, writing as Publius in Federalist No. 44, maintained that the Contracts Clause proscribed "legislative interferences in cases affecting personal rights". *The Federalist* at 301 (Jacob E. Cooke, ed. 1961). Soon after the Constitution was adopted, courts held that the Contracts Clause prevented state legislatures from interfering with private contracts. See *Alexander Champion and Thomas Dickason* v. *Silas Casey* (C. C. D. R. I. 1792) and *Church Land Cause* (C. C. D. Vt. 1799), both described in 1 Warren, *The Supreme Court in United States History* at 66-69 (1926). *Cf. Holmes* v. *Lansing*, 3 Johns. 73 (N. Y. 1802) and *Grimball* v. *Ross*, T. U. P. Charlt. 175, 180-81 (Ga. Super. Ct. 1808) (upholding the Contracts Clause but finding the particular laws did not impair contracts).

The Contracts Clause was later held to cover contracts to which states were a party. *Fletcher* v. *Peck*, 6 Cranch (10 U. S.) 87 (1810). In that case, Chief Justice Marshall said:

> Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general and are applicable to contracts of every description. (6 Cranch at 137.)

Marshall then went on to hold that public contracts were protected. It is worthy of note that Justice Johnson, in partial dissent on other grounds, said:

> There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection of individual rights against the acts of state legislatures. (*Id.* at 144.)

Thus was formed the rule that a state could impair neither private nor public contracts.

History explains the development of a limitation on this rule insofar as public contracts are concerned. In response to *Fletcher*'s recognition that the Contracts Clause covered public contracts, courts developed the doctrine that nevertheless one legislature could not restrict the sovereignty of subsequent legislatures. In *United States Trust* both the opinion and the dissent recognized this doctrine.

The majority in *United States Trust*, citing cases in which states had contracted away various powers, stated that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty" (431 U. S. at 23-24 and notes 20, 21); the dissent, hypothesizing a case in which a legislature perpetuated its policy by making contracts instead of laws, agreed that "new legislators will not automatically be bound by the policies and undertakings of earlier days" (*id.* at 45). Thus, in *United States Trust*, the majority and the dissent agreed that, historically, states could not impair either public or private contracts but that their ability to impair some public contracts arose as a limitation on the rule.

However, in the opinion at bar, the District Court held that a state could impair private contracts more easily than it could impair public contracts. The District Court recognized that, because of the sovereignty conflict, states can impair public contracts more easily than private contracts but quixotically held that private contracts may be impaired more easily than public.

B. The Minnesota Act, by, in Effect, Retroactively Forcing All Pensions to Vest in Ten Years and Retroactively to Be Funded Therefor, Rather Than in Substantially Longer Periods, Drastically Impaired the Express Substantive Terms and Obligations of Allied's Contracts to An Extent That Could Not Have Been Anticipated.

The decision under review has created a vicious doctrine that citizens can anticipate legislatures, despite the Constitution, to revise and impair the express terms of important financial contracts.

This "anticipation" theory is based upon (a) ignoring the provisions of the Pension Plan that clearly anticipated its possible termination and (b) an egregious misreading by the District Court of Note 17 in the *United States Trust* opinion as we now demonstrate:

The District Court, in reaching its conclusion, ignored the plain terms of the Pension Contracts. First, they provided that pensions are payable only out of the Trust the Plan creates. *See* § 15(2) at 17a, Appendix, *infra*. Second, that the Plan may be terminated. *See* § 14 at 13a, Appendix, *infra*, Art. IX at 26a, Appendix, *infra*. Section 14 provides an unqualified right to terminate the Plan or to cease contributions thereto, but that, the rights of all employees to the date of termination or discontinuance, to the extent then funded, shall be non-forfeitable and fully vested. *See* 13a-14a, Appendix, *infra*.

Section 14 sets forth the order in which payments are to be made from the assets of the Trust: first, to provide benefits to persons already retired; second, benefits for those persons whose rights are fully vested and who are eligible for retirement; thirdly, "if any balance of the net assets of the Trust Fund remain after application * * * the Trustee shall apply such balance toward the benefit of all other employees covered by the Plan." *Id*. That, and only that, is what the parties had a right to anticipate upon partial termination of the Plan by closure of the Minnesota office.

To meet its contractual obligation, Allied made contributions to the Plan in accordance with the calculations of actuaries who, following generally accepted actuarial methods, determined that a number of eligible employees would not attain vestiture and, of those who did, a number would never collect a pension for many reasons such as termination of employment and death prior to retirement. The actuaries assumed that pensions would vest after 20 years. J. A. A-75, n. 5. Therefore, when the Plan was terminated as to Minnesota employees, it was not surprising or unanticipated that there were not sufficient assets to provide pension benefits for persons whose rights were not vested and who were not entitled to a pension. But Minnesota would have Allied retroactively pay funds it would have reserved if the terms and provisions of the Plan had provided for a 10-year vesting period.

Before the District Court, Minnesota conceded that its Act impaired the obligations of Allied's pension contracts J. A. A-71, but the District Court excused the impairment on the theory "that a factor to be considered in determining the *extent of impairment* is the *legitimate expectations* of the contracting parties" (emphasis supplied) J. A. A-70. The District Court agreed that Allied could not have expected the possibility of vesting at an earlier date than the contracts provided, *but* that its claim that payment to these employees was not anticipated was flawed because "the likelihood of payment" and the need to accumulate a reserve for that purpose was anticipated. J. A. A-73, A-74.

The District Court offered the foregoing "arguments" "to shed some light" on the concerns expressed by the Supreme Court in *United States Trust* for the "legitimate expectations" of the contracting parties and to show that the obligations created by the Minnesota Pension Act "are not so significantly beyond the parties initial expectations that the Act should be declared unconstitutional." J. A. A-74.

If we correctly read the last two paragraphs of Part II of the District Court's opinion, they say at one and the same time, that Allied could not be expected to anticipate the possibility of earlier vesting than the contract provided but that the payment of the pensions that would be created thereby and the necessity of an adequate reserve to meet them should have been anticipated and, therefore, *the impairment of the express provisions of the contract was to be anticipated*. We may do the District Court an injustice, but it is difficult for us to make anything else but that from the last two, and highly important, paragraphs of Part II of its opinion.

And to make the matter worse, the District Court bases its *tour de force* on asserted concern for Note 17 of the Court's opinion in *United States Trust* and, in so doing, wholly misreads it.

In *United States Trust*, the Court, in Note 17, after recognizing that the obligations of a contract also include contemporaneous State law pertaining to interpretation and enforcement thereof, also said that the parties "are unlikely to expect that State law will remain entirely static", suggested that "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations *than a law adjusting the express terms of the Agreement*". (Emphasis supplied, 431 U. S. at 20, n. 17.)

In short, despite the opaqueness of the District Court's opinion, it seeks to justify an impairment of the express, substantive terms of Allied's pension contracts on the theory this was in the "expectations" of the parties, whereas, this Court said that although citizens may expect some reasonable changes in remedies, they do not expect impairments of the express terms of their agreements. The conflict is apparent and inescapable. This Court was not talking about *extent* of impairment generally, it was talking about the *nature* of impairments that might be expected.

Minnesota, in fact, has impaired the contracts as much as if it now declared that Allied had to pay a minimum wage of $15.00 per hour retroactive to 1967.

Comparing this case to *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934), proves the severity of this impairment. In *Home Building & Loan*, the Court upheld an emergency statute which delayed foreclosures if the mortgagor would pay the mortgagee a reasonable rent. As the Court pointed out several times, the statute altered neither the integrity of the mortgage debt, the obligation to pay interest, the validity of the foreclosure sale, the right to a deficiency judgment, nor any condition of the redemption except its time of exercise. 290 U. S. at 425, 445. Both sides received their due: the mortgagee, agreed money; the mortgagor, agreed possession.

In the case at bar, Minnesota went far beyond *Home Building & Loan*. As the Court of Appeals for the Eighth Circuit said in another case challenging the Minnesota Act, "The Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan, obligations arrived at freely through collective bargaining, and appears in its operation to be a unique legislative act." *White Motor Corporation* v. *Malone*, 545 F. 2d 599, 604 (1976), now before this Court as No. 76-1184. The pension plan at bar, although not collectively bargained as was the plan in *White Motors*, was a contract and was "directly intrude[d] upon."[2]

2. We realize that *White Motor* is before the Court as a pre-emption case under the supremacy clause. Nevertheless, we suggest that the granite underlying White's position is the immunity of its contract to state impairment. This is because the basic achievement of the National Labor Relations Act was to empower the agent selected by a majority of the employees in an appropriate bargaining unit to make a contract with the employer that was binding for and enforceable against the employer and all employees in the unit. (*See generally J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332 (1944).)

Such contracts were unknown when the Constitution was adopted.

But the Labor Act added a new element and elevated what had come to be known as trade union agreements for union members to the status of enforceable contracts binding on all in the unit and, as contracts, assuming otherwise lawful, immune to state impairment.

Individual contracts had always enjoyed the privilege against state impairment which now devolved on bargaining unit contracts.

(Footnote continued on next page.)

Unlike *Home Building & Loan*, Minnesota has not given each party its due; instead, it has written an entirely new contract, containing terms unanticipated by either party, forcing retroactive burdens on one and emoluments on the other.

C. The Minnesota Act Is Not Reasonable and Necessary to Serve An Important Public Goal.

The Contracts Clause limits a state's sovereignty. *Murray* v. *Charleston*, 96 U. S. 432, 444 (1877). Nevertheless, the District Court apparently assumed that the real questions were whether the legislature addressed an issue of public concern and whether it acted arbitrarily. J. A. A-78, A-79. Since all legislation, save private bills, addresses issues of public concern, under the District Court's analysis no statute would come under the stricture against impairing the obligations of contracts. This analysis would emasculate the Contracts Clause.

Comparing the case at bar with *United States Trust* shows the absence of an overriding public concern. In *United States Trust*, the challenged statute affecting the funding mechanism of a bond was adopted in the interest of conserving energy, protecting the environment, and transporting the public. 431 U. S. at 28-29. Nevertheless, the Court held the statute unconstitutional. Those underlying objectives touched virtually every citizen in a vast megapolis. Retroactively changing a pension plan for a relative handful of Minne[illegible] citizens does

(Footnote continued from preceding page.)

That the collective contract is the *desideratum* of federal labor policy is only an additional reason for the immunity of such contracts from state impairment. It would be anamolous if collectively bargained pension plans were immune, but individually created plans of the same nature were not; that the newly created labor contract was more sacrosanct than one individually made which the drafters of the Constitution intended to protect.

The contractual nature of a unilaterally offered pension plan must be grasped. It is akin to bond or debenture issues in which there is no bargaining with the buyers but nevertheless solid contracts are made. The pension plan is as solid a contract with employees as the securities are with the holders thereof.

not. Indeed most of the public, particularly in a predominantly agricultural state such as Minnesota, does not even enjoy private pensions.[3] At worst, late vesting creates an unsatisfactory pension plan; it does not endanger the public. Courts have implicitly recognized this distinction. New Jersey, for example, upheld the statute involved in *United States Trust*, but struck down one resembling the Minnesota Act. Compare *United States Trust Co.* v. *State*, 134 N. J. Super. 124, 338 A. 2d 833 (1975), *aff'd* 69 N. J. 253, 353 A. 2d 514 (1976), *rev'd* 431 U. S. 1 (1977), to *Raybestos-Manhattan, Inc.* v. *Glaser*, 144 N. J. Super. 152, 365 A. 2d 1 (1976). If the statute in *United States Trust*, was unconstitutional, then the Minnesota statute must be unconstitutional *a fortiori*.

3. Less than one-third of Minnesota's non-government workers had private pensions, as tabulated below, assuming that, in Minnesota, the percentage of employees with private pensions was the same as that in the United States. Of course, most of these pensions were unaffected by the Minnesota Act because not many plants with pension plans were closed. The column below, "Thousands of Employees" is taken from U. S. Dept. of Commerce, *1976 Statistical Abstract of the United States* at 367 and 633. The column "Percent of Employees with Private Pensions" is taken from *id.* at 307. The final colum is calculated.

Occupation	Thousands of Employees	Percent of Employees with Private Pensions	Thousands of Employees with Private Pensions
Farm	483	7%	34
Wholesale and Retail	370	35%	129
Manufacturing	313	61%	191
Services	279	24%	67
Transportation and Public Utilities	90	61%	55
Finance, Insurance and Real Estate	75	52%	39
Construction	62	34%	21
Mining	14	72%	10
Totals	1,685		546 or 32.4%

Even under the teaching of the dissent in *United States Trust* as to overriding public goals, the Minnesota Act must be struck down. As the dissent noted, the New Jersey statute under consideration in *United States Trust* impaired neither the principal nor the interest of the bonds affected, but only changed an underlying security. 431 U. S. at 41-44. In contrast, the Minnesota Act has totally rewritten a crucial part of the contract.

The District Court tried to find a crucial public interest by opining that Minnesota feared for its "senior citizens". J. A. A-76. But Minnesota could just as easily fear for its young citizens, its middle-aged citizens, its childless citizens, its parent citizens, *ad infinitum*. Minnesota demonstrated, to paraphrase from the Court, that a governmental entity can always find excuses for extra benefits especially when taxes do not have to be raised. (*See United States Trust*, 431 U. S. at 26.)

Further, the Minnesota Act is unreasonable, even assuming a public need, as seen by contrasting it to the Employee Retirement Income Security Act of 1974 ["ERISA"], P. L. 93-406, 88 *Stat.* 829. Even though Minnesota is commanded by the Constitution to respect existing contracts while Congress is not, Congress was far more respectful of contract rights than was Minnesota. For example, Representatives Ashbrook, Erlenborn, Eshleman, Hansen and Quie believed Congress lacked the constitutional power to "change the contract of an employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." Supplemental Views, H. R. Rep. No. 533, 93d Cong., 1st Sess. (1973). Congress acted prospectively in lowering vesting and entitlement requirements and did not force any employer to change his contracts. ERISA was signed by the President on September 2, 1974, to become effective in part on January 1, 1975, and in other parts at the start of the first pension plan year commencing after January 1, 1975. An employer dissatisfied with ERISA could keep any pension plan he wished, with the only penalty being the possible loss of a tax deduction.

Or he could simply terminate his plan. Many did so.[4] Minnesota did not even grant employers this element of fairness. Minnesota did not give objecting or financially pressed employers any way of avoiding the legislatively imposed terms; it rewrote the terms of the employment contracts by *force majeure*.

Assuredly the Minnesota Act does not meet the tests of *United States Trust* and can be upheld only if the Court decides that the Contracts Clause affords less protection to private contracts than it does to public ones. Such a conclusion would, we believe, reverse legal history and undo the Clause.

CONCLUSION.

The importance of contracts and the Contracts Clause to the citizens of a free, capitalistic society is difficult to overstate. Both the ordinary and the extraordinary affairs of life depend upon freely made lawful contracts that remain immune to state impairment.

The farmer works a lifetime to pay off his mortgage, then retires to town to live off his rent money or payments on the mortgage he has granted a buyer; filling stations and enormous factories and buildings are constructed only because someone is willing to advance money that will be paid back; parents save to create a college fund for their children which they are confident that they can draw on when the need arises. Examples could be cited endlessly and perhaps those we have mentioned

4. In a speech on the Senate floor, Senator Javits reported that an IRS survey indicated that perhaps 30% of the pension plans existent before ERISA was passed may close down. 134 Cong. Rec. S 13528 at S 13530 (daily ed. Aug. 4, 1977). From ERISA's enactment to November 5, 1977, over 19,000 pension plans filed to terminate. Telephone interview on November 17, 1977 with Joel Greenblatt, Pension Benefit Guaranty Corporation, 2020 K St., N.W., Washington, D. C. 20006 (202) 254-4817.

are not the best. But the importance of private contracts to everyone in our society is overriding.

If the District Court opinion at bar not be overruled, it will open the door for impetuous and, perhaps self-seeking, legislators to rip this, that, or the other contract apart in order to confer a favor upon, or ease the path of, some class or group.

It is respectfully prayed that the judgment of the District Court be reversed and the cause remanded to that Court with directions to enter a judgment substantially granting the prayer of the amended complaint and enjoining enforcement of the Minnesota Private Pension Benefit Protection Act.

Respectfully submitted,

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February 28, 1978.

APPENDICES

APPENDIX.

PENSION PLAN FOR SALARIED EMPLOYEES OF ALLIED STRUCTURAL STEEL COMPANY, A DELAWARE CORPORATION, AND ALLIED STRUCTURAL STEEL CORPORATION, A TENNESSEE CORPORATION.

(As amended and effective at the time the Minnesota Act was adopted.)

Section 1. *Purpose:* The primary purpose of this Plan is to provide retirement benefits for eligible employees of Allied Structural Steel Company and Allied Structural Steel Corporation.

Section 2. *Definitions and Construction.*

1. Definitions: The following words and phrases when used in this Plan shall have the meaning set forth herein unless the context clearly indicates to the contrary:

(1) "Plan": The Allied Salaried Employees' Pension Plan, the Plan set forth herein, as amended from time to time.

(2) "Trust": The Allied Salaried Employees' Pension Trust, the Trust established to hold and invest the contributions of the employers for the exclusive benefit of employees included in the Plan.

(3) "Employers": Allied Structural Steel Company, a Delaware corporation, and Allied Structural Steel Corporation, a Tennessee corporation (a wholly owned subsidiary).

(4) "Retirement Committee": The persons appointed to administer the Plan.

(5) "Employee": A person who is receiving remuneration for full-time, personal services regularly rendered to the employers and who is not a member of a collective bargaining unit, including clerical employees, providing such person is one whose continued employment is for more than twenty (20) hours in any one week and more than five (5) months in any one year.

(6) "Part-time Employee": An employee who does not qualify under subparagraph (5) of paragraph 1 of this Section.

(7) "Retirement": The termination of employment after an employee has fulfilled all requirements for a pension. Retirement, generally, commences on the day immediately following the employee's last day of employment (or authorized leave of absence).

(8) "Normal Retirement": The first day of the month next following an employee's sixty-fifth (65th) birthday.

(9) "Continuous Service": Employment by an employer prior to retirement, calculated from the employee's last employment date in the case of re-employment, after a break in continuous service. A leave of absence which is authorized by the employers shall not be considered as interrupting continuity of employment. Leaves of absence may be granted for the purpose of service in the Armed Forces, sickness and disability. With respect to granting of leaves of absence, all employees under similar circumstances shall be treated alike.

(10) "Earnings": The basic compensation paid to an employee for personal services which are rendered during the period of continuous service, not including compensation in the form of bed and board or allowance therefor, overtime bonuses, commissions and other non-recurring compensation.

(11) "Average Monthly Earnings": The result obtained by dividing the sum of the monthly earnings earned by an

employee during the last sixty (60) full calendar months of continuous service prior to retirement by sixty (60) or by the number of months of employment, whichever is less.

(12) "Pension": A series of regular monthly amounts which are payable to a person who is entitled to receive benefits under the Plan.

(13) "Co-pensioner": The spouse of a retired employee who elects to receive a reduced pension pursuant to Section 7 of the Plan.

(14) "Total and Permanent Disability": Total physical or mental disability, or both, through some unavoidable cause so as to preclude engaging in any occupation or employment for remuneration which has continued for a period of six (6) months duration and which is reasonably expected to continue during the lifetime of the employee. A determination of total and permanent disability shall be predicated on medical evidence satisfactory to the Committee. No disability shall be deemed the consequence of any unavoidable cause which is (a) contracted, suffered or incurred as a result of engaging in a criminal enterprise; (b) the result of habitual drunkenness or narcotics addiction; or (c) the result of intentionally self-inflicted injury.

(15) "Effective Date": The date on which the Plan described herein goes into effect, which is April 1, 1963.

2. Construction: The masculine gender, where appearing in the Plan, shall be deemed to include the feminine gender, unless the context clearly indicates to the contrary. The words "hereof," "herein," "hereunder," and other similar compounds of the word "here" shall mean and refer to the entire Plan, not to any particular Section, unless the context clearly indicates to the contrary.

Section 3. *Eligibility of Employees for Pensions.*

1. After the effective date of this Plan, employees on retirement will be eligible for pensions as follows:

(1) An employee who retires on or after his normal retirement date will be entitled to a regular pension as provided in Section 5 of this Plan.

(2) An employee suffering from a total and permanent disability, as defined in Section 1 hereof, who on retirement has fifteen (15) years of continuous service, will be entitled to the following pensions:

(a) On retirement prior to his normal retirement date, the greater of:

(1) $100 per month, or

(2) A pension computed under Section 5 of this Plan but based on continuous service and average monthly earnings to date of retirement, whichever is greater.

(b) On attainment of his normal retirement date, a pension computed under sub-paragraph (a)(2) of this paragraph.

(3) An employee who retires prior to his normal retirement date shall be entitled to an early retirement pension under the following conditions:

(a) If he retires after attaining the age of sixty (60) years, at his option, after fifteen (15) years of continuous service; or

(b) If he retires after having attained the age of fifty-five (55) years or older, after twenty (20) years of continuous service, or such other lesser number of years of continuous service which, added to his age equals the sum of seventy-five (75) years; or

(c) If he retires prior to the time he attains the age of fifty-five (55) years, after twenty-five (25) or more years of continuous service, provided that the sum of his age and years of continuous service equals eighty (80) years.

(e) [*sic*] If any employee becomes eligible for an early retirement pension under any subparagraph of this Section and after a break in continuous service again enters the employ of an employer, his right to such pension is vested and if, after the termination of such second period of his employment, his continuous service thereunder does not qualify him for a pension under any of the provisions of this Section because of the length of his continuous service prior to the second break in continuous service, he shall remain eligible for the pension to which he would have been entitled had he not resumed employment, and his retirement shall be presumed to commence after the time of his first break in continuous service.

(4) An employee eligible to receive an early retirement pension as provided in subparagraph (3) of paragraph 1 of this Section will be entitled, on retirement, to receive either of the following pensions he elects:

(a) A regular pension commencing at the time he attains the age of sixty-five (65); or

(b) A reduced early retirement pension at the time of retirement based on the regular pension to which

he would have been entitled, reduced to its equivalent actuarial value at such time.

Section 4. *Deferred Retirement.*

The retirement of any employee may be extended at the option of the Retirement Committee of an employer from year to year from his normal retirement date until such time as the Retirement Committee considers retirement of such employee to be mandatory.

Section 5. *Pensions.*

1. *Basic Pension.* On retirement an employee will be entitled to receive a pension for the duration of his life, and upon his death his spouse will be entitled to receive a pension during her life of ½ this amount which is equal in value to the actuarial equivalent of the pension provided for in paragraph 2 of this Section.

2. If an employee so elects pursuant to subparagraph (4) of paragraph 4 of this Section, he will be entitled to receive a pension computed under either subparagraph (1) or subparagraph (2) of this paragraph, whichever yields the greater amount.

(1) A pension equal to the product of: (i) 1% of the average monthly earnings of the employee, and (ii) the number of years and fractions of years (computed to the nearest month) of continuous service; or

(2) A pension which is the sum of

(a) $2.60 multiplied by the number of years and fractions of years (calculated to the nearest month) of continuous service after March 31, 1963; and

(b) $2.50 multiplied by the number of years and fractions of years (calculated to the nearest month) of continuous service before April 1, 1963.

(3) The computation under subparagraph (2) of this paragraph shall be based on a maximum of thirty-five (35) years of continuous service.

3. For the first three months of retirement, in lieu of the pension provided for in paragraph [*sic*] 1 and 2 of this Section, employees described in subparagraph (1) of paragraph 1 of Section 3 hereof, and employees described in subparagraphs 3(a), (3)(b) and (3)(c) of paragraph 1 of Section 3 hereof, will be entitled to a "Special Pension" payable in a lump sum and equal in amount to three months' pay computed on the same basis as vacation pay, paid or payable in the year of retirement.

4.

(1) The pension of an employee described in subparagraph (3) of paragraph 1 of Section 3 entitled to an early retirement pension will be computed under paragraph 1 of this Section based on continuous service and average monthly earnings to date of actual retirement, but payable on the first day of the month after his sixty-fifth (65th) birthday, unless he elects to receive the reduced early retirement pension provided for in subparagraph (4)(b) of paragraph 1 of Section 3, in which event the first payment under his pension will commence on the first day of the month following his retirement. However, with respect to any employee entitled to a "Special Pension" in accordance with paragraph 3 of this Section, the first installment of his regular pension will be payable on the first day of the fourth month after the month in which he retires or attains the age of sixty-five (65).

(2) If an employee who qualifies for an early retirement pension under paragraph 3 of Section 3 of this Plan dies prior to the time he actually retires, it shall be presumed, for the purpose of providing surviving spouse benefits under paragraph 1 of this Section that such employee had, in fact, retired on the day before he dies, and that

he had, in fact, made no election of any other alternative pension under this Plan.

(3) With respect to an employee whose retirement is deferred pursuant to Section 4 of this Plan, if he dies prior to actual retirement, it shall be presumed that he, in fact, retired on his normal retirement date and failed to make any alternative election of pension under this Plan.

(4) The election of any option may be made under this Plan at any time prior to one (1) year before retirement or at any other time, provided some evidence of good health is made to the Retirement Committee. Such election may be revoked at any time or one option cancelled and another selected within the time limit prescribed herein. An employee may also, in like manner, change the name of his co-pensioner or revoke either election of options without the consent of his co-pensioner.

Section 6. *Special Provisions Relating to Survivor Pensions.*

1. Any employee entitled to a pension under Section 3 of this Plan may elect to receive his pension as a reduced net pension payable to himself for life, and at his death the same pension to his spouse for life.

2. If a co-pensioner dies after commencement of payment of a pension to an employee, but prior to the death of the employee then receiving a pension; such employee shall continue to receive such reduced net pension for life.

Section 7. *Optional Lump Sum Settlement.*

1. An employee entitled to a pension under subparagraph (1) of paragraph 1 of Section 3, and an employee entitled to a pension under subparagraph (3)(a) of paragraph 1 of Section 3, who makes the election provided for in subparagraph (4)(a) of paragraph 1 of Section 3, may elect to receive his pension in a single lump sum payment. This lump sum plus the

special pension provided for in paragraph 2 of Section 5 shall be in lieu of all other payments and shall be the actuarial equivalent of such pension otherwise payable.

2. This lump sum payment shall be payable on the first day of the month after such employee attains the age of sixty-five (65) or the first day of the month after the month in which he retires, whichever is later.

3. An election to receive the lump sum payment may be made at any time prior to one (1) year before retirement or at any time prior to retirement on presentation of evidence of good health. This election will be effective on written acknowledgement by the Retirement Committee. It may be revoked at any time by the employee prior to retirement.

4. No optional lump sum payment provided for in this Section shall be payable prior to the due date specified in paragraph 2 of this Section. Unless the employee making such election is living on the due date such lump sum becomes payable, no benefits shall be payable under this Section of this Plan to such employee, his heirs, legatees, executors, administrators or assigns.

Section 8. *Restriction Against Competition:* If any former employee of an employer whose salary during the last full year of employment was in excess of $12,000 per year, and who is receiving a pension hereunder, enters into any business activity in competition with or antagonistic or prejudicial to the business affairs of either employer hereunder, his pension rights under this Plan shall be forfeited unless within sixty (60) days after notice from the Committee, he discontinues such activity.

Section 9. *Restriction Against Alienation of Pensions:* Except with respect to any indebtedness owing to the employers, benefits payable under this Plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution, or levy of any kind, either voluntary or involuntary, prior to actually being

received by the person entitled to the benefit under the terms of the Plan, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits payable hereunder shall be void. The Trust shall not in any manner be liable for, or subject to, the debts, contracts, liabilities, engagements or torts of any person entitled to benefits hereunder.

Section 10. *Contributions.*

1. Contributions by employers: The employers shall make contributions in such amounts and at such times as an actuary shall determine, as shall be necessary to meet the benefits payable pursuant to the Plan. All contributions made by the employers to the Trust shall be irrevocable and shall be used to pay benefits under the Plan, or to pay expenses of the Plan or Trust, to the extent not paid by the employers. If any forfeiture of pensions payable under this Plan shall occur at any time, such forfeitures shall be used to reduce the future contributions of the employers, and in no event may they be applied to increase the benefits any employee would otherwise receive under this Plan.

2. Contributions by employees: Employees are not required and shall not be permitted to make any contributions under this Plan.

Section 11. *Administration.*

1. Appointment of Committee: The Plan shall be administered under the supervision and control of a Retirement Committee consisting of at least five, and not more than nine, persons who may be officers, directors or employees of the employers. Members of the Committee shall be appointed from time to time by the Board of Directors of the Company and shall serve during the pleasure of the Board. The Committee shall not receive compensation for its services. All usual and reasonable expenses of the Committee may be paid in whole or in part by

the employers, and any expenses not paid by the employers shall be paid by the trustee out of the principal or income of the Trust.

2. Committee Powers: The Committee shall have all such powers as may be necessary to discharge its duties hereunder, including, but not by way of limitation, the power to construe or interpret the Plan, to determine all questions of eligibility, and to compute the amount and determine the manner and time of payment of any benefits hereunder. The Committee may adopt such rules and actuarial tables and methods as it deems advisable. It may employ such agents, attorneys, accountants, actuaries, medical advisors, or clerical assistants (none of whom need be members of the Committee) as it deems necessary for the effective exercise of its duties, and may delegate to such agents any powers and duties, both ministerial and discretionary, as it may deem expedient and appropriate.

3. Committee Procedures: The Committee shall adopt such by-laws as it deems advisable. The Committee shall elect one of its members as chairman and another as secretary. All acts and determinations of the Committee shall be recorded by the secretary, or under his supervision, and all such records, together with such other documents as may be necessary for the administration of the Plan, shall be preserved in the custody of the secretary. The Committee may take any action upon a majority vote of its members at any time acting, and any statement or document signed by a majority of such members shall have the same effect and may be relied upon to the same extent as if signed by all the members.

4. Rules and Decisions: All rules and decisions of the Committee shall be uniformly and consistently applied to all employees in similar circumstances. Any rule or decision which is not inconsistent with the provisions and purposes of the Plan shall be conclusive and binding upon all persons affected by it.

5. Authorization of Benefit Payments: It shall be the duty of the Committee to furnish the trustee with all facts neces-

sary or pertinent to the proper administration of the Trust Funds, including the names of all persons who shall, from time to time, be entitled to benefits under the Plan, the amounts payable to each, and the dates of payment.

6. Books and Records: The records of the employers shall be conclusive evidence as to all matters forming the basis for participation in the Plan and for the calculation of the benefits.

7. Perpetuation of Committee: In the event that the Company shall cease to be in existence, then, unless the Plan is adopted by a successor, the members of the Committee at that time shall remain in office until final termination of the Trust, and any vacancies in the membership of the Committee caused by death, resignation, disability, or other cause, shall be filled by the remaining member or members of the Committee.

Section 12. *Appointment of Trustee.*

1. A trustee (or trustees) shall be appointed by the Company to administer the Trust. The trustee shall serve at the pleasure of the Company, and shall have such rights, powers and duties as the Company shall from time to time determine.

2. All contributions under this Plan shall be paid to the trustee and shall be held, invested and reinvested by the trustee. All property and funds of the trust, including income from investments and from all other sources, shall be retained for the exclusive benefit of employees, under the direction of the Committee, and shall be used to pay benefits to employees or their beneficiaries, or to pay expenses of administration of the Plan and Trust to the extent not paid by the employers.

3. If any forfeiture of pensions payable under this Plan shall occur at any time, such forfeitures shall be used to reduce the future contributions of the employers, and in no event may they be applied to increase the benefits any employee would otherwise receive under this Plan.

Section 13. *Amendments:* The Board of Directors of the Company reserves the right from time to time to modify, alter or amend this Plan, as well as the Trust provided for herein; provided, however, that no such action shall cause any part of the corpus or income of the Trust to be used for, or diverted to, any purpose other than for the exclusive benefit of employees included in the Plan or their beneficiaries. Any action which is to be taken or may be taken by the Board of Directors of the Company under the provisions of the Plan may be taken by the Executive Committee of the Company.

Section 14. *Termination.*

1. Right to Terminate: The Company may terminate the Plan at any time and may direct and require the trustee to liquidate the Trust. In the event of termination of the Plan or upon complete discontinuance of contributions under the Plan by the employer, the rights of all employees accrued to the date of such termination or discontinuance to the extent then funded shall be non-forfeitable and fully vested.

2. Distribution on Termination: In the event of termination of the Plan, the Committee shall direct the trustee to distribute the net assets of the Trust Fund in the following manner:

(1) The trustee shall apply, for the benefit of employees receiving pensions, as defined in Section 3 of the Plan, the equivalent actuarial value of each such employee's remaining pension payments. If the net assets of the Trust Fund are insufficient to provide the aggregate of such equivalent actuarial values then remaining, the pensions of each such employee shall be reduced pro rata in the proportion which such insufficiency bears to the full equivalent actuarial values.

(2) If any balance of the net assets of the Trust Fund remains after application for retired employees, as provided in subparagraph (1) of this paragraph, the trustee shall

apply such balance for the benefit of employees who are then eligible to retire, pursuant to Section 3 of the Plan. Such application shall be on the basis of the equivalent actuarial value of each such employee's pension, determined according to his continuous service to the date of termination of the Plan. If such balance is insufficient to meet such equivalent actuarial values in full, the retirement income for each employee in this second group shall be reduced pro rata in the proportion which such insufficiency bears to such full equivalent actuarial value.

(3) If any balance of the net assets of the Trust Fund remains after application pursuant to paragraphs 1 and 2 of this Section, the trustee shall apply such balance for the benefit of all other employees covered under the Plan. Such application shall be on the basis of the equivalent actuarial value of each such employee's pension, determined according to his continuous service to the date of termination of the Plan as if such date were his retirement date. If such balance is insufficient to meet such equivalent actuarial values in full, the retirement income for each employee in this second group shall be reduced pro rata in the proportion which such insufficiency bears to such equivalent actuarial value.

(4) Provided that no discrimination in value results, the Committee may direct that the amounts held for or payable to any or all pensioners or co-pensioners be paid in cash or in other assets, including insurance or annuity contracts, as the Committee, in its discretion, may determine. In no event shall the employers receive at any time any amounts from the Trust Fund, except such amounts as may remain after satisfaction of all liabilities under the Plan caused by variations in actual from expected actuarial requirements.

3. Restriction of Benefits Payable to Highly Compensated Employees in the Event of Early Termination of the Plan:

(1) To the extent that Section [*sic*] 5 and 8 of this Plan are in conflict with the provisions hereof, such Sections are hereby modified and controlled by the provisions of this sub-section.

(2) During the first ten (10) years after the establishment of this Plan or for the first ten (10) years after any substantial amendment, and in the event the full current costs of the Plan are not met at the end of such ten year periods until such time as the full current costs of the Plan are first met, the benefits provided by the employer's contributions for the employees, listed in Schedule X, will be subject to the conditions set forth in sub-divisions (4) and (5) hereof.

(3) For the purposes of these conditions:

(a) Schedule X shall consist of a list of the twenty-five (25) highest paid employees as of the time of establishment of the Plan, including any such high paid employees who are not participants at that time but may later become participants, but excluding any employees whose annual benefits provided by employer's contributions will not exceed fifteen hundred dollars ($1500).

(b) "Unrestricted benefits at any time" means benefits of the form called for by the Plan, including any withdrawal values available to a living employee and any death or survivor's benefits payable on behalf of an employee who dies after retirement, which have been provided by employer's contributions, not exceeding the larger of the following amounts:

(1) Twenty thousand dollars ($20,000), or

(2) An amount equal to twenty per cent (20%) of the first fifty thousand dollars ($50,000) of the employee's average regular

annual compensation, multiplied by the number of years since establishment of the Plan.

(c) "Supplemental retirement income payments" means any current payments to a retired employee sufficient, together with his unrestricted benefits, to bring the total current payments to him up to the full retirement income benefits provided under the Plan.

(4) If the Plan is terminated or the full current costs have not been met at any time within ten (10) years after its establishment, the funds or benefits which any of the employees listed in Schedule X may receive from the employer's contributions (including any unrestricted benefits but exclusive of any supplemental retirement income payments he has already received up to that time) shall not exceed his unrestricted benefits at that time.

(5) If any employee listed in Schedule X leaves the employ of the Company or withdraws from participation in the Plan when the full current costs have been met, the funds or benefits which he may receive from the employer's contributions (including any fund or benefit he has already received) shall not, at any time within the first ten (10) years after the establishment of the Plan, exceed his unrestricted benefits at that time.

(6) These conditions shall not restrict the full payment of any insurance, death, or survivor's benefits on behalf of an employee who dies while the Plan is in full effect and its full current costs have been met.

(7) The foregoing conditions do not restrict the current payment of full monthly retirement income benefits called for by the Plan for any retired employee while the Plan is in full effect and its full current costs have been met.

Section 15. *General Provisions.*

1. Employees' Rights Not Enlarged: Nothing contained in this Plan shall be construed as a contract of employment between an employer and any employee, or as a right of any employee to be continued in the employment of the employers, or as a limitation of the right of the employers to discharge any employee with or without cause.

2. Rights to Trust Assets: No employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan, and then only to the extent of the benefits payable to such employee out of the assets of the Trust. All payments of benefits as provided for in this Plan shall be made solely out of the assets of the Trust and neither the employer, the trustee, nor any member of the Committee shall be liable therefor in any manner.

3. Responsibility of Employers: Except to furnish the Committee statements and certificates of facts appearing on their records or material relevant to the proper administration of the Plan, the employers shall have no responsibility or liability whatsoever with reference to the administration of the Plan or to the management and conduct of the Trust or with reference to any act or failure to act upon the part of the Committee or the trustee or their agents, employees or attorneys.

4. Indemnification of Retirement Committee: Neither the Committee nor any member thereof shall be in any way liable for any act or failure to act in connection with the administration of the Plan, and the Company shall indemnify the Committee and each of its members and hold them harmless from the effects and consequences of their acts or conduct in their official capacity, except to the extent that such consequences are the result of their own wilful misconduct or breach of good faith.

Dated: August 7, 1963. [Signatures omitted in printing.]

ALLIED SALARIED EMPLOYEES' PENSION TRUST

This Trust Agreement, made this 7th day of August, 1963, by and between Allied Structural Steel Company, a Delaware corporation, and Allied Structural Steel Corporation, a Tennessee corporation (referred to as the "Companies") in a Pension Plan dated August 7, 1963, and The Northern Trust Company, an Illinois corporation, of Chicago, Illinois, with trust powers (hereinafter called the "Trustee"),

Witnesseth:

WHEREAS, the Companies have established the "Allied Salaried Employees Pension Plan" (hereinafter referred to as the "Plan"); and

WHEREAS, the Plan provides for a Trustee to receive and hold contributions paid under the terms of the Plan; and

WHEREAS, the Plan is to be administered by a Joint Committee (hereinafter referred to as the "Committee") appointed by the Companies (as provided in the Plan); and

WHEREAS, the initial members of the Committee have been appointed;

NOW, THEREFORE, to carry the Plan into effect, the parties hereto do hereby mutually declare and agree:

Article I: *Establishment of Trust*

1. The Companies hereby create and establish a Trust to be known as the "Allied Salaried Employees Pension Trust" in order to carry out the purposes of the Plan.

2. The Trust Fund shall consist of contributions received by the Trustee and the earnings and increment thereon, less disbursements therefrom.

Article II: *Contributions to Trust Fund*

Contributions are to be paid to the Trustee by the Companies. The Trustee shall be accountable for all contributions received from the Companies, but shall have no duty to determine that the amounts received comply with the provisions of the Plan or that the assets of the Trust are adequate to provide the benefits stipulated under the Plan.

Article III: *Payments from Trust Fund*

1. Payments shall be made from the Trust Fund by the Trustee to such persons, in such manner, at such times and in such amounts as the Committee shall from time to time direct the Trustee. All directions by the Committee to the Trustee shall be in writing, signed by one Committee member but no member of the Committee shall sign any directions for any distribution to be made to himself. The Trustee shall be fully protected in making payments out of the Trust Fund in accordance with such written directions and shall have no responsibility to see to the application of such payments or to ascertain whether such directions comply with the terms of the Plan, and shall not be liable for any payment made by it in good faith without actual notice or knowledge of the changed condition or status of any person receiving payments hereunder.

2. If any payments directed to be made from the Trust Fund are not claimed, the Trustee shall notify the Committee, and shall dispose of such payments as the Committee shall direct. In case any payment becomes payable to a person under legal disability or to a person not adjudicated incompetent but who by reason of illness or mental or physical disability is in the opinion of the Committee unable properly to administer such amounts, the payment may be made by the Trustee in accordance with the applicable provisions of the Plan, as directed by the Committee.

3. The Trustee shall be reimbursed for all of its costs and expenses, and shall be paid such reasonable compensation as may be agreed upon from time to time by the Committee and the Trustee. Such costs, expenses, and compensation shall be paid from the Trust Fund. The Trustee shall also pay out of the Trust Fund the expenses of administration of the Plan, including actuarial, accounting, and legal expenses, to the extent that the Committee shall so direct.

Article IV: *Investment of Trust Fund.*

The Trust Fund, except such estimated amounts as are required for current payments and expenses, shall be invested and reinvested without distinction between principal and income. The Trustee is authorized to invest in such bonds, notes, debentures, mortgages, equipment trust certificates, preferred or common stocks, or in such other property, real or personal, either within or without the State of Illinois, as may be permitted, from time to time, in accordance with the applicable statutes of the State of Illinois, pertaining to investments by Trustees. The Trustee is further authorized to invest in common or preferred stocks, bonds, mortgages or notes secured by deed of trust, debentures or other securities of the companies as the committee may direct. The Trustee is authorized subject to the committee's prior direction and consent to lease, sell, exchange, transfer or dispose of, retain and grant options with respect to any such investment directed by the committee. The Trustee is further authorized subject to the discretion and prior consent of the committee:

(a) To make such warranties, representations and indemnifications in connection with the sale or other disposition of such investments as the committee considers appropriate;

(b) To compromise, compound and settle any debt or obligation due to or from the Trust, to reduce the rate of interest on, to extend or otherwise modify, or to foreclose upon default or otherwise modify, or to foreclose upon default or otherwise enforce any such obligation;

(c) To vote in person or by proxy on any stocks, bonds or other securities; or exercise any options appurtenant to any such stocks, bonds or other securities for the conversion thereof into other stocks, bonds or other securities and to make payment therefor;

(d) To join in or to dissent from, and to oppose the reorganization, recapitalization, consolidation, sale or merger of corporations or properties upon such terms and conditions as are considered expedient.

The Trustee may hold any portion of the Trust Fund in cash pending investment or payment of costs of expenses or benefits without liability for interest. Anything contained herein to the contrary notwithstanding, the Trustee is authorized to deposit any part or all of the funds held under this Trust Agreement with The Northern Trust Company, an Illinois corporation, of Chicago, Illinois, as Trustee, under that certain "Declaration of Trust creating the Collective Employee Benefit Trust Fund of The Northern Trust Company" dated October 2, 1961, as the same may be amended from time to time, such funds to be held and invested by The Northern Trust Company as such Trustee, pursuant to all the terms and conditions of such Declaration of Trust, which is hereby incorporated by reference herein.

Article V: *Powers of Trustee.*

The Trustee is authorized and empowered: to hold, manage, improve, repair and control all property, real or personal, at any time forming part of the Trust Fund; to sell, convey, transfer, exchange, partition, lease for any term, even extending beyond the duration of the Trust, and otherwise dispose of the same

from time to time in such manner, for such consideration and upon such terms and conditions as the Trustee, in its discretion, shall determine; to employ such agents and counsel as may be reasonably necessary in managing and protecting the Trust Fund and to pay them reasonable compensation; to settle, compromise or abandon all claims and demands in favor of or against the Trust Fund; to vote any corporate stock either in person or by proxy for any purpose; to exercise any conversion privilege or subscription right given to the Trustee as the owner of any security forming a part of the Trust Fund; to consent to, take any action in connection with, and receive and retain any securities resulting from any reorganization, consolidation, merger, readjustment of the financial structure or sale of the assets of any corporation or other organization, the securities of which may constitute a portion of the Trust Fund; to cause any securities or other property which may at any time form a part of the Trust Fund to be issued, held or registered in the name of its nominee, or in such form that title will pass by delivery, provided the records of the Trustee shall indicate the ownership of such securities; to borrow from anyone, including the Trustee, such sum or sums, at any time and from time to time, as the Trustee may consider necessary and desirable and for the best interests of the Trust Fund and for that purpose to mortgage or pledge all or any part of the Trust Fund; to pay any estate, inheritance, income, or other tax, charge, or assessment which it shall or may be required to pay out of any moneys or other property in the Trust Fund for the account of the person whose interests hereunder may be liable for such tax; and, in addition to the enumerated powers herein, to do all other acts in its judgment necessary or desirable for the proper administration of the Trust Fund.

Article VI: *Accounts of Trustee.*

1. The Trustee shall maintain accurate and detailed records and accounts of all investments, receipts, disbursements and other transactions hereunder, and all accounts, books, and records relating thereto shall be open at all reasonable times to inspection and audit by any person or persons designated by the Committee.

2. Within sixty (60) days following the close of each annual period (as may be agreed upon by the Trustee and the Committee), the Trustee shall file with the Committee a written account setting forth a description of all securities and other property purchased and sold, all receipts, disbursements, and other transactions effected by it during such annual period, and listing the securities and other property held by it at the end of such period.

3. The Committee may approve such accounting by written notice of approval delivered to the Trustee or by failure to express objection to such accounting in writing delivered to the Trustee within six (6) months from the date upon which the accounting was delivered to the Committee.

4. Upon receipt of a written approval of the accounting, or upon the passage of said period of time within which objections may be filed, without written objections having been delivered to the Trustee, such accounting shall be deemed to be approved, and the Trustee shall be released and discharged as to all items, matters and things set forth in such accounting as if such accounting had been settled and allowed by a decree of a court of competent jurisdiction in an action or proceeding in which the Trustee, the Committee and all persons having or claiming to have any interest in the Trust Fund or under the Plan, were parties. The Trustee, nevertheless, shall have the right to have its accounts settled by judicial proceeding if it so elects, in which event only the Trustee and the Committee shall be necessary parties.

Article VII: *Responsibility of Trustee.*

1. The Trustee shall be fully protected from any responsibility for any action taken or omitted in accordance with written directions purporting to be signed by the persons authorized to sign for the Committee. The Trustee may rely upon any certificate, notice or direction purporting to have been signed on behalf of the Committee which the Trustee believes to be genuine and to have been signed by the members of the Committee or by an agent of the Committee whose authority has been certified to it by the Committee. Until and unless the members of the Committee shall file with the Trustee a certificate of the appointment of a new member, the Trustee may rely upon any certificate, notice or direction purporting to have been signed by the members of whose appointments the Trustee shall have last been duly notified.

2. The Trustee may consult with counsel, who may be counsel for the Employers in respect of any of its duties or obligations hereunder and shall be fully protected in acting or refraining from acting in accordance with the advice of such counsel.

Article VIII: *Succession of Trustees.*

1. The Trustee and any successors in trust may be removed by the Companies at any time upon the giving of sixty (60) days' notice in writing to the Trustee then acting, but such notice may be waived by the Trustee. Such removal shall be effected by delivering to the Trustee a written notice of its removal, and by giving notice to the Trustee of the appointment of a successor Trustee in the manner hereinafter set forth.

2. The Trustee and any successors in trust may resign as Trustee hereunder by filing with the Companies a written resignation which shall take effect sixty (60) days after the date thereof, unless prior thereto a successor Trustee shall have been appointed.

3. The Companies may appoint a successor Trustee by delivery to the removed or resigning Trustee of (a) an instrument in writing, appointing such successor Trustee, and (b) an acceptance in writing executed by the successor Trustee so appointed, and the appointment shall take effect upon such delivery.

4. Any successor Trustee may be a bank or trust company incorporated under the laws of the United States of America or any State thereof. All of the provisions set forth herein with respect to the Trustee shall relate to each successor Trustee so appointed, with the same force and effect as if such successor Trustee originally had been named herein as Trustee.

5. Upon the appointment of a successor Trustee, the removed or resigning Trustee shall transfer and deliver the assets in the Trust Fund to such successor Trustee, after reserving such reasonable amount as it shall deem necessary to provide for any sums chargeable against the Trust Fund for which it may be liable. The receipt of the successor Trustee and the approval of the Committee to the final accounting of the removed or resigning Trustee shall be a full and complete acquittal and discharge of such removed or resigning Trustee; and any successor Trustee shall have no liability whatsoever for the acts or omissions of any prior Trustee. If the Committee shall fail to express objection to such accounting in writing delivered to the removed or resigning Trustee within six (6) months from the date of receipt by the Committee of such final accounting, such accounting shall be considered as approved.

6. In the event that any corporate Trustee hereunder shall at any time merge or consolidate with, or shall sell or transfer substantially all of its assets and business to another corporation, state or federal, the corporation resulting from such merger or consolidation or the corporation into which it is converted or to which such sale or transfer shall be made shall thereupon become and be the Trustee under this Agreement with the same effect as though originally so named.

Article IX: *Termination of Trust.*

1. This Agreement and Trust may be terminated at any time by the Companies upon written notice delivered to the Trustee. Upon such termination the Trust Fund may be continued or liquidated, in accordance with the written directions of the Committee and the applicable provisions of the Plan. Unless sooner terminated, the Trust created hereunder shall terminate when there shall be no funds remaining in the hands of the Trustee hereunder.

2. In no event shall the Companies at any time receive any amounts from the Trust, except such amounts as may remain after the satisfaction of all liabilities of the Plan and arising out of the variations as between actual requirements and expected actuarial requirements.

3. If the Trust is terminated for any reason, the Trustee may reserve from the Trust Fund such reasonable amount as it shall deem necessary to provide for any sums chargeable against the Trust Fund for which it may be liable.

4. From and after the date of the termination of the Trust and until the final distribution of the Fund, the Trustee shall continue to have all the powers provided under the Trust Agreement as are necessary and expedient for the orderly liquidation and distribution of the Fund.

Article X: *Amendments to Trust.*

The Companies shall have the right at any time and from time to time to amend this Agreement in whole or in part by an instrument in writing executed by them and delivered to the Trustee provided that no amendment shall cause any part of the Trust Fund to be used for, or diverted to, purposes other than for the exclusive benefit of employees covered under the provisions of the Plan, and provided further, that the rights, duties or responsibilities of the Trustee shall not be changed

in any manner without its written consent. Any amendment shall become effective upon the date therein stated but shall not be binding upon the Trustee until delivery of the written amendment to the Trustee, provided that any amendment which changes the rights, duties or responsibilities of the Trustee shall become effective only upon the endorsement of the Trustee's written consent.

Article XI: *Jurisdiction.*

1. This Agreement shall be construed and enforced according to the laws of the State of Illinois.

2. In case any provisions of this Trust Agreement shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining provisions of this Trust Agreement, but shall be fully severable, and the Trust Agreement shall be construed and enforced as if said illegal or invalid provisions had never been inserted herein.

Article XII: *Guarantees.*

1. The Committee shall have complete authority to determine the existence, nonexistence, nature and amount of the rights and interests of all persons in the Trust Fund or under the Plan. In any action or proceeding affecting the Trust Fund or any property constituting part or all thereof, or the administration thereof, or for instructions to the Trustee, the Committee, the Companies, and the Trustee shall be the only necessary parties, and no employees or former employees under the Plan or their beneficiaries, or any other person having or claiming to have an interest in the Fund or under the Plan shall be entitled to any notice or process, and any judgment that may be entered in such action or proceeding shall be binding and conclusive on all persons having or claiming to have any interest in the Fund or under the Plan.

2. No interest in any payments under this Trust shall be subject in any manner to attachment, anticipation, alienation,

sale, transfer, assignment, pledge, encumbrance, or charge; and any attempt so to attach, anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge shall be void. Nor shall the Trust be in any manner liable for or subject to the debts, contracts, liabilities, engagements, or torts of any person entitled to any pension.

IN WITNESS WHEREOF, the Companies, and the Trustee, respectively, have caused these presents to be signed by their duly authorized officers and have caused their respective corporate seals to be hereunto affixed, the day and year first above written.

[Signatures and corporate seals omitted in printing.]

brief for appellee

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	2
Statute Involved	2
Question Presented	3
Statement	3
Summary of Argument	7
Argument	9
I. Under the Principles of United States Trust and Other Contract Clause Cases, the Lower Court Properly Concluded That the Minnesota Pension Act Is a Necessary and Reasonable Enactment Serving Legitimate Public Purposes.	9
A. The Act Serves Legitimate Public Purposes	12
B. The Purposes Of The Minnesota Pension Act Are Achieved In A Necessary And Reasonable Manner.	15
1. Introduction	15
2. The Minnesota Pension Act Is Necessary.	19
3. The Minnesota Pension Act Is Reasonable.	21
II. The Minnesota Pension Act Is Permissible Legislation, Despite Allied's Claims Of Its Retroactivity.	25
Conclusion	28

TABLE OF AUTHORITIES

PAGE

Cases:

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 14

Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975) 22

East New York Savings Bank v. Hahn, 326 U.S. 230 (1945) 24

El Paso v. Simmons, 379 U.S. 497 (1965) 10, 11, 24

Fleck v. Spannaus, —— Minn. ——, 251 N.W.2d 334 (1977) 4, 5, 6, 7, 13, 14

Fleck v. Spannaus, 412 F. Supp. 366 (D. Minn. 1976) 3, 5

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 21

Helvering v. Davis, 301 U.S. 619 (1937) 14

Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934) 7, 11, 21, 23

Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (7th Cir. 1948), *cert. denied in part*, 336 U.S. 960 (1949), *aff'd. on other grds.*, 339 U.S. 382 (1950) 22

Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967) 23

Manigault v. Springs, 199 U.S. 473 (1905) 17

Minnesota Gas Co. v. Public Service Comm., 523 F.2d 581 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) 24

Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) 14

PAGE

New York Central R.R. v. White, 243 U.S. 188 (1917) 14, 24

Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 365 A.2d 1 (1976) 18, 19

Stephenson v. Binford, 287 U.S. 251 (1932) 8, 11, 21, 23

Sturges v. Burn Mfg. Co., 231 U.S. 320 (1913) 24

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 7, 10, 11, 14, 15, 16, 17, 18, 19, 20

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 8, 25

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 24

PAGE

Constitutional and Statutory Provisions:

U. S. Const. art. I, § 10, cl. 1 ..... 2, 4, 9

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* 13, 25, 27

Minnesota Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01 *et seq.* (1976) ..... Passim

Other Authorities:

C. Siegfried, "The Role of Private Pensions" in *Private Pensions and the Public Interest* (1970) . 7, 11

H. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), Pension Reform Act, U. S. Code Cong. and Adm. News 288 (1974) 13

Hearings on Private Welfare and Pension Plans, Before the Subcommittee on Labor of the Sen. Committee on Labor and Public Welfare, 92nd Cong., 2d Sess. 736 (June 3, 1972) 13

M. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 Harv. L. Rev. 952 (1962) 7, 12

Note, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. Pa. L. Rev. 167 (1976) 17

S. Rep. No. 93-383, 93rd Cong. (1974), Pension Reform Act, U. S. Code Cong. and Adm. News 508 (1974) 13

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-747

WALTER J. FLECK, et al.,

Appellants,

vs.

WARREN SPANNAUS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF OF APPELLEES

OPINIONS BELOW

The opinion of the three-judge federal district court is not reported in an official reporter; it is contained in the joint appendix herein at A-67. The opinions of the District Court for the District of Minnesota and the Minnesota Supreme Court concerning related issues of the instant case are, respectively, reported at 412 F.Supp. 366 (D. Minn. 1976) and —— Minn. ——, 251 N.W.2d 334 (1977).

JURISDICTION

The amended judgment of the three-judge federal district court was entered on September 21, 1977. The plaintiff filed a Notice of Appeal to this Court on September 27, 1977. The Jurisdictional Statement was filed on November 25, 1977, and this Court noted probable jurisdiction on January 23, 1978. This Court's jurisdiction rests on 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const. art. I, § 10, cl. 1 provides, in relevant part:

> No state shall . . . pass any . . . law impairing the obligation of contracts . . .

STATUTE INVOLVED

The Minnesota Private Pension Benefits Protection Act, Minn. Stat. ch. 181B (1974) (hereinafter the Minnesota Pension Act) is set forth in the Appendix at A-90.

QUESTION PRESENTED

Whether the lower court was correct in holding that the Minnesota Pension Act, as it applies to the employees pension plan of the Allied Structural Steel Company, is valid under the Contract Clause of the United States Constitution.

STATEMENT

For many years Allied Structural Steel Company ("Allied") maintained a Minnesota office which monitored the construction of steel buildings and bridges in 30 states.[1] *Fleck v. Spannaus*, 412 F. Supp. 366, 368 (D. Minn. 1976). In December, 1974, Allied commenced the instant action against appellees, Warren Spannaus, the Attorney General of the State of Minnesota, and other Minnesota state officials [2] charged with enforcing the Minnesota Private Pension Benefits Protection Act ("Minnesota Pension Act"), Minn. Stat. ch. 181B (1976).

Allied sought summary judgment from a three-judge federal district court declaring that the Minnesota Pension Act was invalid under various state law theories and on constitutional grounds. Before issuing its decision on the constitutional issues, the three-judge court certified questions of state law [3] to the Minnesota Supreme Court and appointed a special master to make certain findings of fact.[4] The Minnesota Su-

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[1] By its Order of August 5, 1976, the three-judge federal district court herein ruled that all three individual plaintiffs (Fleck, Hamler and Richert) lacked standing to challenge the constitutionality of the Minnesota Pension Act and, therefore, dismissed them from the lawsuit. Consequently, Allied Steel now is the only real party in interest as appellant. It does not raise the validity of that dismissal before this Court.

[2] Appellees will be referred to as the State of Minnesota hereinafter.

[3] *See* Minn. Stat. § 181B.17 (1976).

[4] *See* unreported lower court opinion contained in Appendix (hereinafter abbreviated as "App.").

preme Court subsequently ruled that the Minnesota Pension Act was applicable to Allied Steel. *Fleck v. Spannaus*, —— Minn. ——, 251 N.W.2d 334 (1977). In reaching that conclusion, the court also held that the Federal Employee Retirement Income Security Act of 1974 (ERISA) was not effective at the time of Allied's Minnesota office closing and, in fact, its passage was in doubt at the time of the enactment of the Minnesota statute. 251 N.W.2d at 338.

On April 7, 1977, the Special Master submitted his Findings of Fact to the lower court.[5] He found that as of June 30, 1974, Allied Steel's salaried employees pension plan had a total net deficiency of $295,341 as to all employees who were accruing pension credits under its own plan. He also concluded that there had been no earmarking of contributions to the pension fund for specific employees and that the possibility of closure of its Minnesota office was not one of the actuarial assumptions which had been used in developing Allied Steel's pension plan.[6]

Subsequently the district court held on September 2, 1977, that the Minnesota Pension Act was constitutional under the Contract and Commerce Clauses of the United States Constitution and under the Due Process and Equal Protection Clauses of the Constitution's Fourteenth Amendment.[7] In seeking to appeal that decision, Allied now asserts as the sole basis for its appeal that the Minnesota Pension Act violates the Contract Clause, U. S. Const. art. I, § 10, cl. 1.

The Minnesota Pension Act was enacted on April 9, 1974. It protects accrued pension benefits of any Minnesota "employee" with ten or more years of employment by an employer

[5] All parties have stipulated to the Findings of Fact pursuant to Rule 53(e)(4) of the Federal Rules of Civil Procedure.
[6] Special Master's Findings of Fact at 3-7; *see also* App. at A-73.
[7] App. at A-85.

maintaining a "place of employment" within Minnesota.[8] This protection is provided by requiring a Minnesota employer who terminates a Minnesota place of employment or pension plan to pay a pension funding charge if such action results in the forfeiture of employee pension benefits. The pension funding charge, which is fundamentally an amount equal to benefits that the qualified employees accrued under the pension plan, is paid by the employer's purchase of prepaid, deferred annuities payable to the protected Minnesota employees upon retirement age as set forth in the pension plan or to the employees' beneficiaries upon the employees' death. Minn. Stat. § 181B.12 (1976).[9]

The Allied Steel Salaried Employees' Pension Plan was established on August 7, 1963, and has been in existence continuously since that date. The plan is for the benefit of salaried employees, none of whom are unionized. It has been qualified as a single-employer plan under the Internal Revenue Code § 401.[10] This qualification enables Allied to treat its contributions to the plan as deductions from its income tax obligations. The same deductions are permitted under Minnesota tax law. Minn. Stat. § 290.26 (1976). *See also*, I.R.C. § 404.

Under the pension plan, an employee is entitled to full vesting of his pension for early retirement purposes if: 1) he has worked fifteen continuous years and has attained the age of 60; or 2) after he has attained the age of 55 and has worked

[8] For definitions of the relevant terms used in the Minnesota Pension Act, *see* Minn. Stat. § 181B.02 (1976), App. at A-90-A-95.
[9] The Minnesota Pension Act has been preempted by ERISA, 29 U.S.C. § 1144(a); however, the preemption did not take effect until January 1, 1975, and does not apply to any cause of action accruing prior to that date. Fleck v. Spannaus, 412 F. Supp. 366 (D. Minn. 1976); Fleck v. Spannaus, — Minn. —, 251 N.W.2d 354 (1977).
[10] Fleck v. Spannaus, 412 F. Supp. 366, 368 (D. Minn. 1976).

20 continuous years, or a lesser number of continuous years of service, which when added to his age equals the sum of 75; or 3) before reaching age 55, he has at least 25 or more years of continuous service such that the sum of his age and continuous years of service equal 80. None of the employees with benefits fully vested under the Allied pension plan is at issue here.

On July 31, 1974, Allied ceased operations in Minnesota and eleven employees at the division were terminated.[11] At least nine of these employees had been employed by Allied Steel for more than ten years prior to their termination but had not reached retirement age under the Pension Plan. Since mandatory ten-year vesting under ERISA was not effective until January 1, 1976, the nine Minnesota employees do not receive any accrued benefits under the Pension Plan or through federal insurance under ERISA. The only protection of accrued pension benefits available to the Minnesota employees is that protection provided by the Minnesota Pension Act. *See Fleck v. Spannaus*, —— Minn. ——, 251 N.W.2d 334, 338-39 (1977).

In September, 1974, pursuant to the Minnesota Pension Act, Allied notified the Minnesota Commissioner of Labor and Industry of its intention to cease the operation of its place of employment in Minnesota. Thereafter, when it became apparent that the State of Minnesota intended to enforce the Minnesota Pension Act and the funding charge thereunder against Allied,[12] the company commenced an action for declaratory and injunctive relief. That action has led to Allied's appeal to this Court.

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[11] This termination was begun *subsequent* to the effective date of the Minnesota Pension Act.

[12] On August 18, 1975, the State of Minnesota notified Allied of the assessment of a pension funding charge of $185,751. At Allied Steel's request, an administrative hearing was granted to determine the accuracy of the funding charge. This hearing has been held in abeyance pending the outcome of the litigation.

SUMMARY OF ARGUMENT

The Minnesota Pension Act is a valid police power enactment which is in accord with the principles enunciated in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977): *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934) and other modern Contract Clause cases. That is, the statute is directed to obvious public purposes and, under any appropriate degree of deference to Minnesota legislative judgments, is aimed at achieving those purposes in a necessary and reasonable manner.

Unlike the New Jersey statute invalidated in the *United States Trust* case, the Minnesota Pension Act constitutes a broad measure regulating a wide range of private agreements and conduct. It is designed to protect employee pension benefits which have accrued for at least 10 years with one employer. In turn, this protection is designed to relieve the employees/retirees of severe economic hardships due to the unexpected loss of pension rights, and to insulate Minnesota taxpayers from potentially burdensome health and welfare costs. The obvious relationship of inadequate and forfeited private pensions to the public health and welfare is well documented. *See Fleck v. Spannaus*, —— Minn. ——, 251 N.W.2d 334, 338 (1977); C. Siegfried, "The Role of Private Pensions" in *Private Pensions and the Public Interest* (1970); and M. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 Harv. L. Rev. 952 (1962).

Again, in contrast to the statute at issue in *United States Trust* (intended exclusively to apply to the repeal of only one prior public contract to which the state was a party), the Minnesota statute is both necessary and reasonable. That is, in the circumstances of this case, the statute's protection of substan-

tial accrued pension benefits which would otherwise be forfeited due to terminations of pension plans or offices is necessary and reasonably related to its means for achieving such objectives. Essentially those means are encompassed in the statutory requirement that, if an employer such as Allied closes a Minnesota office or terminates its employee pension plan, it is liable for a pension funding charge. That charge is equal to the amount of pension benefits accrued by employees with at least 10 years' service, to the extent the employer's pension fund is inadequate to pay such benefits. Minn. Stat. §§ 181B.-03-.06 (1976). *Compare Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 438 (1934) (upheld statute on finding, in part, that the measures for achieving a legitimate purpose are reasonable and appropriate) and *Stephenson v. Binford*, 287 U.S. 251, 272 (1932) (test of reasonableness is whether, in sound legislative judgment, there is actual relation between a statute's means and ends).

Finally, any retroactive effect of the Minnesota Pension Act upon Allied is permissible under modern Contract Clause cases and, specifically, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

ARGUMENT

I. UNDER THE PRINCIPLES OF UNITED STATES TRUST AND OTHER CONTRACT CLAUSE CASES, THE LOWER COURT PROPERLY CONCLUDED THAT THE MINNESOTA PENSION ACT IS A NECESSARY AND REASONABLE ENACTMENT SERVING LEGITIMATE PUBLIC PURPOSES.

Although Allied initially raised several claims against the Minnesota Pension Act,[13] it now rests its appeal solely on the allegation that the statute unconstitutionally impairs its contract rights under its own employees pension plan, in violation of U.S. Const. art. I, § 10. Specifically, Allied argues [14] that: 1) the provisions of the company's pension plan which delay the vesting of employee pension benefits until 20 years of service are allegedly impaired by the act's requirement of vesting after 10 years; [15] and 2) the provision of the pension plan limiting the liability for pension benefits only to the amount of money in the trust fund (even if underfunded) is

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[13] *See* App. at A-11-A-12.

[14] *See* Appellant's Brief at 12-13 and lower court opinion, App. at A-75, n. 5. The contract impairments alleged by Allied are not totally clear and consistent. Before the lower court it argued that its employment and trust contracts were impaired, despite the fact that the employees had no control over the latter agreements. Yet its brief to this Court indicates that its right to terminate the pension plan also is impaired. In that regard, the State emphasizes two key points: 1) the Act does not prevent Allied from terminating its pension plan; and 2) at the time the instant action was commenced the pension plan, in fact, was not terminated; only Allied's Minnesota office was closed.

[15] Minn. Stat. §§ 181B.03-.06 (1976) provide that when an employer in the *future* terminates a place of employment or pension plan, it owes a pension funding charge equal to the present value of pension benefits accrued by employees with *10 or more years of service covered by the pension plan* to the extent those benefits would be forfeited by such termination.

allegedly impaired by the Act's imposition of liability on the company for the balance of accrued benefits.[16]

The lower court did not question that the foregoing effects of the Minnesota Pension Act might constitute an impairment of Allied's contract rights. But, it sustained the validity of the statute by noting properly that only impairments which are either unreasonable or unnecessary or not related to a valid public purpose are unconstitutional. The court based its decision on the principles enunciated by this Court in *United States Trust Co. v. State of New Jersey*, 431 U.S. 1 (1977) and other leading Contract Clause cases.[17]

Although the ultimate standards for reviewing statutes in Contract Clause challenges have not changed much in this century, the lower court correctly noted that the most current definitive statement of those standards is contained in the *United States Trust* case. The formulation of the Contract Clause standards is as follows: even if a statute impairs contract obligations, it will be upheld if it serves a legitimate *public purpose* and does so in a *necessary* and *reasonable* manner. *United States Trust* at 15-16, 21-23; *El Paso v. Simmons*, 379

[16] Minn. Stat. §§ 181.03-.06, .11-.12 (1976) make the employer liable for the payment of those pension benefits for which the pension fund is inadequate. This payment must be made through the purchase of a prepaid deferred annuity, which the Special Master herein calculated to cost $114,117.93 to $185,751. *See* See Special Master's Findings of Fact at 7. The lack of a precise amount is attributable to various interpretations of Allied's pension plan and the cost of annuities at different times. *Id.* The Special Master also found that, under its own pension plan, Allied's pension fund was underfunded by $295,341 at the time its Minnesota office was closed. *Id.* at 3.

[17] Contrary to Allied's assertions in its Brief at 8, the lower court decision did not turn solely on the question of whether Allied's contracts were "public" or "private" in nature. As explained in more detail hereinafter, the lower court merely noted that such a distinction had some relevance in reviewing a statute's necessity and reasonableness. Moreover, the decision below rested upon the traditional Contract Clause tests as reflected in the cases supporting the United States Trust decision.

U.S. 497 (1965); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); and *Stephenson v. Binford*, 287 U.S. 251 (1932).

The statute in *United States Trust* was struck down because this Court concluded that, even though it might be directed at a laudable purpose, it was unnecessary and unreasonable. In that case a 1962 statutory covenant between New York and New Jersey and certain bondholders had expressly provided that none of the revenues or reserves which were security for Port Authority bonds would be used to finance certain rail transit expenditures without the bondholders' consent. A 1974 New Jersey repealer statute [18] allowed the states to apply revenues from the pre-existing bond securities to the construction of the previously prohibited transit facilities. This Court concluded that the impairment of the bondholders' rights under the 1962 covenant was unconstitutional under the Contract Clause. In reaching that conclusion this Court expressly relied on its decisions in *El Paso v. Simmons*, 379 U.S. 497 (1965) and *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), and the tests enunciated in those cases for resolving Contract Clause challenges. 431 U.S. at 15-16.

In the *United States Trust* case the invalidated statute obviously was directed exclusively at *repealing* one prior statutory contract to which the state itself was a party. In contrast, the Minnesota Pension Act is a general enactment regulating a wide range of subjects (including more than just contracts) in the area of private pensions, an area where the number of broken pension agreements and shockingly underfunded pension funds are legion. *See* C. Siegfried, "The Role of Private Pensions" in *Private Pensions and the Public Interest*, 7, 9 *et*

[18] New York had also passed a statute similar to the 1974 New Jersey law.

seq. (1970); M. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 Harv. L. Rev. 952 (1962).

As amplified by the following discussion, the foregoing points show that the lower court's application of this Court's traditional Contract Clause tests was correct.

A. The Act Serves Legitimate Public Purposes

Allied does not seriously dispute the fact that the Minnesota Pension Act is directed to valid public purposes. Its only apparent claim regarding this aspect of the Contract Clause test is its assertion that the statute aids only a small portion of Minnesotans, *i.e.* merely senior citizens.[19]

This argument fails in several respects. First, Allied offers no authority for the rather novel proposition that the legitimacy of a police power statute's public purpose is measured by the precise number of persons served by the statute. Second, Allied cannot cite any evidence in the record of the instant case supporting its implication that only a small number of persons benefit from the statute.[20] In addition, as the lower court noted, it is well established that a police power statute is not rendered invalid simply because it does not address all problems of all citizens in a particular area. *See* lower court opinion, App. at A-78.

At any rate, even if only a small percentage of Minnesota's population *directly* benefited from the Act, the statute nonetheless qualifies as a major police power enactment serving the state's broad general health and welfare. In addition to

[19] Brief of Appellant at 17-18.

[20] Allied's references to the alleged predominance of agriculture in Minnesota and *national* employment statistics are based not on the record but only on assumptions and speculations that should be rejected as improper. *See* Brief of Appellant at 18.

the thousands of employees with pension rights potentially affected by the Minnesota Pension Act, there are thousands of other Minnesota taxpayers who would have benefited by the savings in state health and welfare costs which could have arisen from the absence or inadequacy of promised pension funds.[21]

The Minnesota Pension Act on its face is directed to the protection of the economic welfare of employees and senior citizens by assuring them the receipt of earned and expected pension benefits and, consequently, falls within the broad scope of the police power of the state of Minnesota.[22] Indeed, the forfeiture of anticipated pensions because of inadequately funded plans is particularly devastating since it generally affects persons at an age when they frequently have no other source of income beyond Social Security and are normally too old or infirm to reenter the labor market. *See* district court opinion, App. at A-76. As a result, the loss of pension income

[21] The Minnesota Pension Act, of course, was preempted as of January 1, 1975, when comparable provisions of ERISA, 29 U.S.C. §§ 1001 *et seq.* (1974) became effective. *See* Fleck v. Spannaus, —— Minn. ——, 251 N.W.2d 334 (1976). The significance of Allied's statement that the Minnesota Pension Act was passed a few months before the enactment of ERISA is not clear. *See* Appellant's Brief at 4. As observed by Bernstein, *supra*, the failures of companies to provide adequate pensions were well known and debated by Congress for many years. Certainly, the Minnesota legislature cannot be faulted for declining to rely solely on *possible* federal legislation with unspecified ultimate protections at an unknown future date; instead, it directly addressed these failures and problems through the Minnesota Pension Act. Indeed, the Minnesota Supreme Court observed in Fleck, *supra*., that at the time of the Act's passage, both the provisions and passage of the federal legislation were uncertain. *Id.* at 338.

[22] *See, e.g.*, the committee reports supporting the Congressional bills leading to the enactment of ERISA, S. Rep. No. 93-383, 93rd Cong. (1974), Pension Reform Act, U.S. Code Cong. and Adm. News 508, 516 (1974); H. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), Pension Reform Act, U.S. Code Cong. and Admin. News 288, 294 (1974); Hearings on Private Welfare and Pension Plans, Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 2d Sess. 736, 783 (June 3, 1972).

can result in the inability to maintain adequate housing, clothing or nutrition.[23]

The state interest in assuring adequate income to the elderly has been recognized by this Court. *See Helvering v. Davis*, 301 U.S. 619 (1937); *see also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *New York Central R.R. v. White*, 243 U.S. 188 (1917); and *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). The public purposes of the Minnesota Pension Act, in particular, have been noted specifically by the Minnesota Supreme Court during another stage of the proceedings of the instant case. *Fleck v. Spannaus*, —— Minn. ——, 251 N.W.2d 334, 338-340 (1977).

The public purposes and importance of the Minnesota Pension Act, therefore, are manifest. Allied's comparison of the purpose of the Act to the purpose of the New Jersey statute invalidated in *United States Trust* is inappropriate, since this Court ruled against the latter statute substantially because it was found to violate other facets of the Contract Clause test, *i.e.* it was unnecessary and unreasonable. In contrast, the Minnesota Pension Act not only serves valid public purposes but, as will become more clear hereinafter, it also is both necessary and reasonable.

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[23] Furthermore, the mass forfeiture of retirement benefits that the Minnesota Pension Act seeks to prevent can result in adverse consequences for the surrounding community through reduced purchasing power and an increased demand for welfare funds and related public services. As stated before, therefore, a great many more persons than simply the elderly would benefit from the statute.

B. The Purposes Of The Minnesota Pension Act Are Achieved In A Necessary And Reasonable Manner.

1. Introduction.

Much of Allied's argument[24] is devoted to persuading this Court that the lower court's decision rested solely on the allegedly "new" principle that legislatures are permitted to impair private contracts more easily than public contracts (*i.e.* those to which a state is a party). According to Allied, this distinction by the lower court constitutes a misinterpretation of this Court's decision in *United States Trust*.[25] However, such an argument is an oversimplification and reveals a misunderstanding of the lower court's opinion.

Allied's misunderstanding is disclosed by the fact that the lower court made it unmistakably clear that it considered the *United States Trust* decision to constitute a reaffirmation of prior Contract Clause cases.[26] For example, the lower court expressly noted that *United States Trust* "ultimately" stood for the proposition that statutory impairments "can be sustained only if reasonable and necessary to serve important purposes of the state."[27] The court also expressly relied[28] upon this Court's statement in *United States Trust* that "complete deference" to a legislative determination of reasonableness and necessity is not appropriate. *United States Trust*, *supra*, at 25.

The reasoning of the lower court further illustrates the weakness of Allied's argument on this point. After passing upon the purposes of the Minnesota Pension Act, the lower court analyzed the statute further by reviewing the *nature* of the

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[24] Appellant's Brief at 8-11.
[25] *Id.*
[26] Lower court opinion at App., A-69.
[27] *Id.* at A-71.
[28] *Id.* at A-70, A-75.

contractual relationship affected in the instant case and the *extent* of the impairment.[29] Both of these issues were reviewed in the course of determining the statute's necessity and reasonableness. The lower court's only reference to a distinction between public and private contracts was in the context of analyzing the *nature* of the contract relationship herein. Thus, that distinction was applied only with respect to one facet of evaluating the issues of reasonableness and necessity. It certainly did not form the sole basis of the lower court's decision.

Moreover, the public-private contract distinction is based in logic and on *United States Trust*, where this Court stated:

> The states must possess broad power to adopt general regulatory measures without being concerned that *private contracts* will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements.
>
> . . .
>
> Yet private contracts are not subject to unlimited modification under the police power. . . . As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> . . .
>
> As with laws impairing *private contracts*, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard [to the instant case involving a *public contract*], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate *because the State's self-interest is at stake.*

431 U.S. at 22, 25 (emphasis added and citations omitted).

[29] *Id.* at A-70.

Furthermore, there is additional express evidence of this Court's acceptance of the distinction between public and private contracts in related cases. In *United States Trust* this Court compared the public and private contracts distinction to the "dual standard" it has applied under the Fifth Amendment in reviewing federal laws which retroactively abrogate the government's obligations under federal bonds to redeem the bonds at specified values. It observed that legislation interdicting private contracts would be viewed with less scrutiny than laws abolishing Congress' own contractual obligations, and that the extent of the limitations on the exercise of a state's reserved police powers to impair contracts depended upon the "nature of the contractual relationship." 431 U.S. at 22-26 and n. 25. *Compare* lower court opinion at App., A-70.

It is logical to apply the reasonable-and-necessary test more strictly in a case where the contractual relationship is public in nature, *i.e.* where the state, as in *United States Trust*, is one of the contracting parties. In such a circumstance it is likely that in enacting a statute which abrogates or impairs its own contracts a state legislature might be motivated more by its own self interest than by the general public welfare. Conversely, states should be granted more deference and flexibility in passing statutes (*e.g.*, the Minnesota Pension Act) which incidentally impair a number of private contractual relationships when such statutes are reasonably directed to a problem of clear public importance.

Where a state law impairs purely private contract rights, it is more likely to be within the realm of legitimate police powers than a law which is arbitrarily directed at a specific public contract. *See Manigault v. Springs*, 199 U.S. 473 (1905); App. at A-70; *Note, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resur-*

rection of the Contract Clause, 125 U. Pa. L. Rev. 167, 187-196 (1976).

The New Jersey statute at issue in *United States Trust* is a good example of the need for the public-private contract distinction. In that case a state legislature enacted a law which was directly and exclusively designed to repeal (not merely impair) a prior contract to which that same state was a party.[30] Certainly, there would have been no argument in *United States Trust* that the repealed statutory contract coincidentally "happened to be" within a wide range of contracts affected by a broad enactment.

Allied attempts to confuse the question even further by noting that a New Jersey state court has invalidated another New Jersey law "resembling" the Minnesota Pension Act.[31] *See Raybestos-Manhattan, Inc. v. Glaser*, 144 N.J. Super. 152, 365 A.2d 1 (1976). Allied, however, conveniently ignores the lack of resemblance between the two laws in several critical respects. First, the statute in *Glaser* applied only to employers of 500 or more employees located at one location entirely within New Jersey.[32] Second, because of the fact that the New Jersey statute essentially applied only to one employer (Raybestos), the court struck down the law as special legislation and *not* as a Contract Clause violation. Thus, the statute in

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[30] One of the main reasons for the invalidations of the 1974 New Jersey law was this Court's belief that the mass transit problems to which the 1974 act was directed were clearly foreseeable by the New Jersey legislature prior to and at the time of the 1963 statutory covenant. 431 U.S. at 6-9, 31. It simply is not generally reasonable for a party (*i.e.*, a state) to a public contract to alter or abrogate unilaterally the terms of its own contract when the basis for such changes were known to or foreseeable by that party at the time of entering into the contractural relationship.

[31] Appellant's Brief at 17.

[32] The Minnesota Pension Act applies more broadly to employers of 100 or more employees, only one of whom need be employed within Minnesota. *See* Minn. Stat. § 181B.02, subds. 2 and 3 (1976), at A-90.

Glaser was, in fact, similar to the law at issue in *United States Trust*, in that both statutes were directed exclusively at one employer and one contract.

Contrary to Allied's mischaracterizations, the lower court's application of the public-private contract analysis is both correct and limited merely to the initial determination of the degree of deference to be given legislative judgments regarding a statute's necessity and reasonableness. In the instant case, the Minnesota Pension Act is reasonable and necessary under even a minimal degree of deference to the legislature.

2. The Minnesota Pension Act Is Necessary.

One means for determining the necessity of the Minnesota Pension Act is to measure it against alternative methods for achieving the same public purposes. *See United States Trust*, 431 U.S. at 29-30.

In *United States Trust*, for example, this Court found the 1974 New Jersey repealer statute unnecessary, in part, because the statute's objectives, *i.e.*, reducing automobile use and improving mass transit, could be accomplished by other acceptable means such as imposing state taxes on vehicle miles traveled in the Port Authority area, increased commuter tolls and increased gasoline taxes. 431 U.S. at 30, fns. 28, 29.

As alternatives in the instant case, Allied Steel, citing ERISA, asserts 1) that the Minnesota statute should apply its pension vesting and entitlement requirements only prospectively and 2) permit companies to terminate their pension plans during a grace period before the statute becomes effective. Appellant's Brief at 18-19. But, as the lower court properly noted, these suggestions are not truly alternatives to the valid public purposes for which the Minnesota Pension Act was necessary:

> . . . [T]he Minnesota legislature rejected both of these alternatives because either would have been inconsistent with the Act's central purpose—to assure some measure of retirement income to those affected by present plan[t] closures and plan terminations. Although the legislature might have adopted a less drastic means to accomplish its purpose, the approach it chose is not unreasonable or arbitrary merely because it requires funding to commence from the date of enactment.

Lower court opinion at App., A-79.[33]

The necessity of the Minnesota Pension Act is substantially greater than the need for the statute at issue in *United States Trust*. There, this Court ruled that one reason for holding the statute in question unnecessary under Contract Clause analysis was that the law's *total repeal* of the prior statutory covenant was not essential to its objectives. 431 U.S. at 29-30. The Minnesota Pension Act, however, constitutes a very limited step in dealing with the critical problems caused by inadequately funded pension plans, since it applies only to employers who terminate their places of employment or their pension plans and whose plans are inadequately funded. Thus, the act is designed to prevent the forfeiture of accrued pension benefits by a substantial number of employees. Surely the Minnesota Pension Act not only is far more necessary to its objectives than the statute reviewed in *United States Trust* but also is the only effective method for achieving its demonstrable public purposes.

[33] Furthermore, as indicated in Argument II, *infra*, Allied's contentions that ERISA applies only prospectively are incorrect.

3. The Minnesota Pension Act Is Reasonable.

It is axiomatic that one who challenges the constitutionality of a police power enactment must make a substantial showing of the statute's unreasonableness. *Compare, Usury v. Turner Elkhorm Mining Co.*, 428 U.S. 1 (1976) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).[34] A common formulation of the test of reasonableness in Contract Clause cases was expressed by this Court in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934):

> The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and *the measures taken are reasonable and appropriate to that end.*

290 U.S. at 438 (emphasis added). Similarly, in *Stephenson v. Binford*, 287 U.S. 251, 272 (1932) this Court stated:

> The extent to which . . . they [statutory provisions] conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought . . . are matters addressed to the judgment of the Legislature, . . . *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the* [statute's] *means and the end.*

(Emphasis added.)

[34] Although Hadacheck v. Sebastian involved constitutional issues other than the Contract Clause, it provides good insight into the test of a statute's reasonableness and the heavy burden facing a party challenging a statute's constitutionality. In that case this Court upheld the reasonableness of a zoning regulation which totally proscribed the plaintiff from using his property for brickmaking, despite the facts that he had purchased his property *before* it was subject to zoning controls and had previously used it for brickmaking. In addition, under the zoning regulation the property's value was decreased by several hundred thousand dollars from its previous value; and the property was not usable for residential purposes.

Under the foregoing tests, the lower court's finding that the Minnesota Pension Act was a reasonable exercise of the state's police power is well founded. The application of the Act arises only when pension benefits have been forfeited as a result of a private pension plan termination or the cessation of operation of a place of employment in Minnesota. Furthermore, it imposes liability on an employer only with respect to employees with 10 or more years of covered service and only to the extent the pension fund is inadequate to cover the benefits promised under the pension plan. *See* Minn. Stat. §§ 181B.02, subds. 6, 10, 11, 12 and 16 and 181B.03-.07 (1976).

Thus, an employer subject to liability would already have received the primary benefits of a significant period of productive service from employees to whom benefits would be payable under the Act. The employer also would have enjoyed the tax benefits for contributions previously made to the pension plan. In preventing the forfeiture of anticipated pension benefits, the Minnesota Pension Act simply insures that the employee receives the deferred compensation he worked for and expected in his retirement years.[35]

Allied's claim that the Minnesota Pension Act is unreasonable because it allegedly imposes actuarially unanticipated lia-

[35] To the extent that the problems of inadequate private pensions were foreseeable, it is noted that the Minnesota Pension Act represents the first attempt by the Minnesota legislature to provide a meaningful response to those problems. Certainly, there is no evidence herein that the employees of Allied had any expectation that they would not receive their full pensions. *See* Craig v. Bemis Company, 517 F.2d 677, 680 (5th Cir. 1975) and Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 249-50 (7th Cir. 1948), *cert. denied in part* 336 U.S. 960 (1949), *aff'd on other grounds* 339 U.S. 382 (1950), where the courts found that both employers and employees regard pensions as deferred compensation, and each *expects* such promised future benefts to attract and keep employees. Therefore, the Minnesota Pension Act simply required Allied to pay the deferred compensation in the form of pension benefits accrued by its employees.

bility on the company is without merit. *See* Appellant's Brief at 3, 12-14. In essence, the company asserts that its contributions to the pension plan were actuarially determined based on the anticipation that only a limited number of participants would ever actually qualify for pension benefits because of the stringent vesting provisions of the Pension Plan. Such a theory is inapposite to plant shut-downs covered by the Minnesota Pension Act. The lower court's conclusions in this regard are well supported by the Special Master's Findings that Allied Steel's actuarial assumptions in planning its pension program were *not* based on the possibility of plant closure. Indeed, the forfeiture of pension benefits resulting from the cessation of operations of a place of employment, such as are covered by the Minnesota Pension Act, may actually provide a windfall to the employer at the expense of the terminated employees. *See* lower court opinion, App. at 6a; *Lucas v. Seagrave Corp.*, 277 F.Supp. 338, 345 (D. Minn. 1967). Accordingly, imposing liability on the employer to prevent the forfeiture of those employees' benefits can hardly be said to be irrational or oppressive. Indeed, applying the tests of reasonableness under *Blaisdell* and *Binford, supra,* the statute's method of protecting employees' earned [36] pensions (particularly since ERISA was not in effect) is reasonably related to its objective of reducing the burdens on employees and the state in general of underfunded pensions.

[36] Allied's statement that the statute unfairly creates emoluments on one party (employees) and burdens on another (employer) is in error. *See* Appellant's Brief at 8. The Act merely provides that if an employer such as Allied elects to terminates a plant or pension plan, it must pay for the pension benefits already *earned* by certain employees. Perhaps Allied simply believes that an employer is entitled to emoluments itself by unilaterally terminating pension plans and thereby depriving employees with up to 20 years' service of their earned deferred compensation. Certainly, it cannot be argued that the Act's establishment of a 10-year vesting period is per se unreasonable, since that same vesting period is used in ERISA. 29 U.S.C. §1053.

Allied's claim that the lower court's decision requires citizens to "anticipate" future legislative enactments again overstates the issue. *See* Appellant's brief at 12. It is well settled by now that, due to the complexities of modern social and economic demands, companies which operate in commonly regulated industries are deemed to know that their activities may become subject to further regulation in the overall public interest. *Cf. City of El Paso v. Simmons*, 379 U.S. 497 (1965); *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232 (1945); and *Minnesota Gas Co. v. Public Service Commission*, 523 F. 2d 581, 583 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976). Despite their modifications of preexisting contracts, collective bargaining agreements, insurance policies and similar private arrangements, laws setting minimum wages, (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)); child labor restrictions (*Sturges v. Burn Mfg. Co.*, 231 U.S. 320 (1913)); and workers' compensation requirements (*N.Y. Central Railroad Co. v. White*, 243 U.S. 188 (1916)) have been sustained against constitutional attacks.

A logical basis for the foregoing cases is the public need to prevent private parties, particularly those in regulated industries enmeshed in diffused public interests, from immunizing themselves by contracts from reasonable statutory regulation necessary to the public welfare. The fact that the Minnesota Pension Act alters the vesting period set up by Allied's pension plan does not, therefore, make it constitutionally unreasonable.

Certainly it is reasonable to extend the protection afforded by the Minnesota Pension Act to previously-accrued benefits, because to apply its protection only to those benefits earned after its passage would have rendered the Act ineffectual until many years after enactment. To limit the application of the Minnesota Pension Act to benefits earned subsequent to enact-

ment would mean that a 20-year employee whose employment was terminated due to a plant shutdown one year after the passage of the Minnesota Pension Act, would still forfeit nineteen years of accrued pension benefits, (assuming the employer's pension fund was inadequate to meet accrued pension benefits) with the state law protecting only one year of benefits. It was not unreasonable for the legislature to choose a method of protection that avoided such a virtually total emasculation of the purpose of the Minnesota Pension Act.[37] Consequently, there is no merit to the contention that the application of the Minnesota Pension Act to benefits accrued prior to its passage is unreasonable.

II. THE MINNESOTA PENSION ACT IS PERMISSIBLE LEGISLATION, DESPITE ALLIED'S CLAIMS OF ITS RETROACTIVITY.

Throughout its brief Allied argues that the Minnesota Pension Act is unconstitutional because it allegedly *retroactively* changes its pension plan. Although Allied presses only a Contract Clause claim herein, it is perhaps helpful to review this Court's views on the validity of retroactive legislation *per se*. The tests for analyzing both Contract Clause and retroactive legislation claims generally are the same. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); C. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

Of particular significance to the instant case is *Usury v.*

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[37] Congress chose a similar course in ERISA. For example, the minimum vesting standards apply with respect to years of service prior to enactment. 29 U.S.C.A. § 1053(b)(1) (1975). Similarly, ERISA termination insurance protects benefits accrued prior to passage, and even applies retroactively to some plan terminations that occurred prior to passage. 29 U.S.C.A. §§ 1322 and 1381(b)(2) (1975).

Turner Elkhorn Mining, supra, where in upholding the Black Lung Benefits amendments to the Federal Coal Mine Health and Safety Act of 1969, this Court ruled:

> We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—operators and the coal consumers.

428 U.S. at 18.

Despite its requirement that coal mine operators had to pay statutory health benefits based, in part, on irrebuttable presumptions as to disabilities to miners who had left their jobs *before* the black lung amendments were passed, the constitutionality of the statute was upheld. Although the law in *Turner Elkhorn Mining* was challenged as retroactive legislation violative of Due Process rights, this Court noted the similarity of such cases to Contract Clause cases.

Any retroactive effects of the Minnesota Pension Act are likewise no less permissible than those of the statute at issue in *Turner Elkhorn Mining*. The Minnesota Act ultimately provides that if an employer such as Allied decides in the future to terminate a place of business or pension plan, then it must be prepared to insure that all pension benefits accrued by employees with 10 or more years of service under the employer's own pension plan will receive that deferred compensation. Minn. Stat. §§ 181B.02, subds. 6, .03-.06 (1976) at A-91-97. Obviously, the statute has no effect against employers whose pension plans are fully funded or employers who chose not to terminate a plan or place of business. In effect, the employer is the party who largely determines the extent of the Act's retroactivity, by controlling the funding of his pension plan and the decision to terminate it. Unlike minimum wage

laws, for example, the statute does not retroactively change the amount of pension or wage benefits previously established by the employer. And, as noted by the lower court, the statute in the instant case does not have the effect of imposing liability for unanticipated events triggering the payment of benefits under Allied's pension plan, since Allied's actuaries included tables and events *other than* the possibility of plant closure in their calculations. Lower court opinion at A-72-73.

Allied attempts to bolster its claim of the Minnesota Pension Act's retroactivity by comparing it to ERISA. But, certainly, ERISA is no less retroactive than the Minnesota law.

For example, ERISA requires pension plans such as Allied's to meet one of three minimum vesting standards pertinent to the instant case. Under 29 U.S.C. § 1053(a)(2) there are three alternative vesting schedules which must be met: 1) a 100% vesting of benefits for 10 years of employee service; 2) a 5-15 year graduated schedule providing for 25% vesting after 5 years, 50% after 10 years; and 100% after 15 years; or 3) a 50% vesting when an employee's age and years of service equal 45, with 10% additional vesting in each of the following 5 years. Since an employee's service *prior* to the enactment of ERISA must be included in the foregoing schedules, they obviously retroactively modify prior pension agreements, particularly in situations where pension plans were underfunded at the time of ERISA's enactment.

Furthermore, 29 U.S.C. § 1061(2) would have the effect of requiring pension plans such as Allied's to meet ERISA's participation and vesting provisions by December 31, 1975. Again, this requirement would have a retroactive effect on plans such as that at issue herein.

Even in comparison with ERISA, therefore, the Minnesota Pension Act is not unconstitutionally retroactive when analyzed under the principles of *Turner Elkhorn Mining*.

CONCLUSION

The lower court's decision that the Minnesota Pension Act was a reasonable and necessary enactment serving a valid public purpose is fully supported by this Court's holdings in other cases regarding the Contract Clause and retroactive legislation. We respectfully request, therefore, that this Court affirm the judgment entered in this cause by the three-judge federal district court for the District of Minnesota.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK, ET AL.,

Appellants,

vs.

WARREN SPANNAUS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF OF APPELLANT ALLIED STRUCTURAL STEEL COMPANY

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TABLE OF CONTENTS.

PAGE

Argument 1

Appendices:

Raybestos-Manhattan, Inc. v. Glaser, Nos. A-608-76, A-690-76 (Super. Ct. N. J., App. Div., filed March 1, 1978) 1a

Affidavit of Phyllis Spielman 1b

TABLE OF AUTHORITIES.

Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648 (1935) 5

East New York Savings Bank v. Hahn, 326 U. S. 230 (1945) 2, 4

El Paso v. Simmons, 379 U. S. 497 (1965) 2

Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934) 2, 4

Legal Tender Cases, 12 Wall. (79 U. S.) 457 (1870) 5

Malone v. White Motor Corporation, ____ U. S. ____, No. 76-1184 (decided April 3, 1978) 3

Mitchell v. Clark, 110 U. S. 643 (1884) 5

New York v. United States, 257 U. S. 591 (1922) 5

Pudlik v. Public Service Company of Colorado, 166 F. Supp. 921 (D. Colo. 1958) 5

Raybestos-Manhattan, Inc. v. Glaser, 144 N. J. Super. 152, 356 A. 2d 1 (1976), *aff'd*, Nos. A-608-76, A-690-76 (Super Ct. N. J., App. Div., March 1, 1978) 4

Sinking Fund Cases, 99 U. S. 718 (1878) 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK, ET AL.,

Appellants,

vs.

WARREN SPANNAUS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF OF APPELLANT ALLIED STRUCTURAL STEEL COMPANY

ARGUMENT

We respectfully suggest that the case has narrowed down to a rather simple issue as the following analysis shows:

Minnesota does not deny that its Pension Act drastically impaired the obligations of Allied's pension contracts.

Employer payments into a pension trust are a form of compensation. Thus, the Minnesota Act is no less than a retroactive wage increase for employees who had been paid in direct cash or fringe benefits everything they were entitled to.

Moreover, Allied's unrestricted contractual right to terminate the Plan at any time and to require the trustee to liquidate

the Trust was changed to one that permitted Allied to terminate it only if it paid a "pension funding charge" the amount of which was determined by the difference between what the Plan required and what was required on the 10 year vesting provision that Minnesota created.

Therefore, it is apparent that the case presents a genuine question of impairment going to the substance of important financial contracts—unlike *Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U. S. 398 (1934), where the substance of the contract remained untouched but the enforcement process was altered.

We thus come to what we see as the turning point of this appeal—was the statute passed to meet a "vital" public need (*Blaisdell,* 290 U. S. at 434), a "vital interest" (*East New York Savings Bank* v. *Hahn,* 326 U. S. 230, 232), an "important" one (*El Paso* v. *Simmons,* 379 U. S. 497, 517; *United States Trust,* 431 U. S. at 21, 25, 29) or was it a temporary stopgap law to meet a parochial problem?

Minnesota seeks to avoid this hard question by erroneously asserting that Allied does not seriously dispute that the Act is directed to valid public purposes and by saying the statute "serves a legitimate" or "valid" public purpose (Minnesota Brief at 12). This dilution of the requirement that a problem, if it is to warrant contract disruption, be urgent fails for two reasons:

1. It is legally wrong—the Court never has held that *any* legitimate public purpose will suffice—it must be a "vital" or "important" one.

2. As we demonstrate below, the statute served no general, but a mere parochial purpose.

Minnesota's brief tacitly concedes (p. 12) that only a "small percentage" of its population benefited directly from the Act, but inconsistently charges (p. 12) that Allied cannot cite any

evidence in the record supporting its implication that only a small number benefit. The charge is incorrect. The brief writers overlook that on February 11, 1975, appellee Phyllis Spielman, Administrator of Minnesota's Pension Protection Division, made affidavit, originally filed in the Northern District of Illinois, that "potentially 15[1] Minnesota employees of Allied Structural Steel Company [were] covered by the Act * * * approximately 1500[2] terminated Minnesota employees of the White Motor Corporation and approximately 30 Minnesota employees of Thermotech Plastics Division of International Telephone and Telegraph." Spielman affidavit, ¶ 13, Appendix B at 4b *infra.* We travel outside the record to affirm that we are reliably informed (and will accept correction by Minnesota if we are wrong), that the reference to the 30 Thermotech Plastics Division employees was erroneous. In that enterprise only a particular division was closed; its employees and their pension rights were transferred to another installation of the employer, International Telephone and Telegraph, so that the Act did not apply to them. Thus, only 1281 employees out of a Minnesota population of approximately 3,934,000, with 1268 of them employed by one employer, were potentially or contingently involved. We say contingently because it is a statistical certainty that not all of the 1281 will live to attain normal retirement age of 65 and entitlement to a pension. Permit us to guess that about 900 will survive.

Minnesota seeks to bolster its public purpose argument by asserting that there are thousands of Minnesota taxpayers who would benefit from savings in state health and welfare costs which might arise from the inadequacy of private pension funds. This argument is without real substance, for supplementary in-

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1. Ms. Spielman was not quite correct—13 Allied employees are involved. Joint Appendix at A50.

2. Subsequent investigation revealed the actual number was 1268. *Malone* v. *White Motor Corporation,* No. 76-1184, decided April 3, 1978, at footnote 5.

comes or assistance for retired industrial employees are provided by the federal Social Security and Medicare programs. While Minnesota does have peripheral programs that affect all persons 65 or older, such as free bus fares, reduced real estate taxes, and the like, few of these are keyed to want or necessity, and, in any event, the amounts of Minnesota public funds involved for about 900 survivors would be inconsequential. Certainly there is no evidence in the record as to these hypothetical benefits to Minnesota taxpayers.

The fact is that there was no vital necessity for this law. In contrast is the situation when Minnesota passed its Mortgage Moratorium Law in 1933 which was held constitutional in *Blaisdell*. There, the legislature made a declaration of emergency and elaborate findings of the then disastrous state of affairs. These recitals were carried into this Court's opinion (290 U. S. at 417). Thus, in 1933 the Minnesota legislature recognized that, even though the cruel facts of the Depression were known to everyone, there had to be a vital public necessity for it to alter even the enforcement provisions of mortgage contracts. It told what that vital necessity was. But the 1974 legislature, apparently determined to go ahead with its Pension Act, found itself unable to make a declaration or findings akin to those which had been made in 1933. Nor were there the exhaustive legislative hearings and studies which the New York legislature engaged in before passing its Mortgage Moratorium Law and which were relied on by this Court in deciding *East New York Savings Bank* v. *Hahn*, 326 U. S. 230 (1945).

Minnesota decries our reference to a similar pension vesting act adopted in New Jersey and held unconstitutional by the New Jersey courts. *Raybestos-Manhattan, Inc.* v. *Glaser*, 144 N. J. Super. 152, 356 A. 2d 1 (1976) *aff'd.* ..... A. 2d ..... (Copy attached as Appendix A at 1a, *infra*.) Although Minnesota points out cosmetic differences between its Act and that of New Jersey, the real difference between the two situations appears to be that Minnesota affected approximately 1281 em-

ployees, $10,150,000,[3] and two employers while New Jersey reached approximately 880 employees, $13,474,357 and one employer.

Turning to Minnesota's cases. Minnesota treats due process cases arising under the 5th Amendment, as to the federal government, and the 14th, as to state governments, as being the equivalent of contract impairment cases arising under Article I. It is true that many of the considerations involving due process cases are close to those involving contract clause cases, but the Court has never held that the prohibitions are identical.

On the contrary, in cases in which federal action has been attacked both as impairing the obligations of contracts and as a taking of property without due process, the Court repeatedly has held that the prohibition against impairment of contracts does not apply to the federal government. It would have been unnecessary to make this distinction if the Court believed that the tests of constitutional validity were the same under the contracts concept as under due process. The Court never has treated the due process clauses and the Contracts Clause as identical. *See, e.g., Legal Tender Cases*, 12 Wall. (79 U. S.) 457 (1870); *Sinking Fund Cases*, 99 U. S. 718 (1878); *Mitchell* v. *Clark*, 110 U. S. 643 (1884); *New York* v. *United States*, 257 U. S. 591 (1922); *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648 (1935). Lower federal courts that have decided the question agree that the Contracts Clause is not incorporated in the due process clause of the Fourteenth Amendment. *See, Spears* v. *Mount Etna Morris*, 313 F. Supp. 52 (W. D. Mo. 1969), *aff'd.* 431 F. 2d 1089 (1970); *Pudlik* v. *Public Service Company of Colorado*, 166 F. Supp. 921, 925 (D. Colo. 1958).

The prohibition against state impairment of contracts is definite, although the Court has held that it must yield to the

3. Approximately $10,000,000 beyond what White Motor had guaranteed plus approximately $150,000 placed on appellant.

exercise of state sovereignty in cases where vital interests of state sovereignty are concerned. *United States Trust*, 431 U. S. at 21.

The due process clauses are neither definite nor readily defined. Due process, we submit, is a more amorphous and relaxed limitation on state and federal power than the Contracts Clause is upon the exercise of state power. This is shown by the cases just cited and by an examination of the cases Minnesota cites. Thus, *Stephenson* v. *Binford*, 287 U. S. 251, 272 (1932), cited by Minnesota, involved state regulation of contract motor carriers and regulation of state highways. Both matters affected wide public interests. *Usery* v. *Turner Elkhorn Mining Company*, 428 U. S. 1 (1976), involved the question of federal substantive due process in imposing workman's compensation type liability upon mine operators for the benefit of miners who antecedently had contracted black lung disease. Finally, at its page 24, Minnesota cites cases involving regulated businesses such as public utilities in which historically it has been recognized that states or the federal government can regulate rates and other conditions of the business regardless of private contracts. Such cases are inapposite here.

The line, however thin, between violation of due process and impairment of contracts is important. Some day ERISA, which contains elements of retroactivity, although far milder than here, may be before the Court. That case, if there be one, can await its own study and analysis. But, if it comes, that case will not involve the Contracts Clause inhibiting state action.

Paraphrasing and changing the tense from United States Trust at page 16, "The Contract Clause is not without meaning in modern constitutional jurisprudence and its limitation on state power is not illusory."

CONCLUSION

The brief *amicus* of the Chamber of Commerce has ably pointed out the importance of the stability of contracts to the carrying on of commerce throughout the 50 states. It is respectfully prayed that the Court reverse the judgment of the district court and direct it to enjoin enforcement of the Act.

Respectfully submitted,

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April 19, 1978.

APPENDICES

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
Appellate Division

RAYBESTOS-MANHATTAN, INC., a corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

SIDNEY GLASER, et al.,
Defendants-Appellants

and

JOHN LEOGRANDE, et al.,
Intervening Defendants-Appellants.

A-608-76
A-690-76

Argued January 4, 1978 — Decided March 1, 1978

Before Judges LOMM, SEIDMAN, and MILMED.

Per Curiam.

We affirm substantially for the reasons expressed in the comprehensive opinion of Judge Lenox reported at 144 *N. J. Super.* 152 (Ch. Div. 1976).

Additionally, we question whether the Legislature, in the guise of taxation, may take from an employer made subject thereto by the statute an amount equal to "the total amount of nonvested pension benefits of such employees of the employer who have completed 15 years of covered service • • • and whose nonvested pension benefits have been or will be forfeited because of such termination of employment • • •," and then cause the moneys to be distributed to each eligible employee making claim thereto, in the amount of the current value of the benefits to which each would be entitled.

While the Private Nonvested Pension Benefits Protection Tax Act, P. L. 1973, c. 124 (the "Act") does not by its terms specifically establish a "dedicated fund" in the sense that the monies collected under the Act are required to be held separate and apart from the general revenues of the State and dedicated to a specific purpose, it is obvious that the Legislature intended the monies collected from an employer to be used to pay the "nonvested pension benefits" to his employees. This intention is evidenced by Section 8 of the Act which provides that each such employee shall be entitled to make a claim for an immediate payment of the current value of his nonvested pension benefits or a deferred pension benefit and to receive such payment or benefit in accordance with the rules and regulations promulgated by the Commission of Labor and Industry.

Under the Act the tax is "equal to the total amount of nonvested pension benefits" which employees will lose upon the closing of their employer's place of business (Sec. 3).

The Statement accompanying the Senate Committee's version of the bill says:

> The revenues collected from the tax would be paid to employees to the extent of their nonvested pension rights in accordance with rules and regulations promulgated by the Commissioner of Labor and Industry.

In view of the foregoing, it appears there is merit to respondent's assertion that the intent of the Act is to require the employer to provide for each employee exactly what he would have received if he had qualified for a pension under the terms of the employer's pension plan, and that the role of the State is simply that of a fiscal intermediary.

Respondent's argument that the Act which expired on July 1, 1975, is not a tax in that it does not raise money for general revenue purposes or a public purpose, its sole purpose being to provide specific employees with funds equivalent to their nonvested pension benefits with the Director of Taxation serving merely as a conduit of monies secured from the respondent

employer for the individual benefit of its employees, is persuasive. 71 *Am. Jur.* 2d "Taxation," § 3, p. 345, § 44, pp. 373-374, § 48, p. 375. *United States* v. *Butler*, 297 U. S. 1, 61, 30 L. Ed. 477, 485 (1936); *The Tide-water Co.* v. *Coster*, 18 N. J. Eq. 518, 523 (E. & A. 1866); *Roe* v. *Kervick*, 42 N. J. 191, 207 (1964).

Carmichael v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245 (1937), in which the validity of a tax assessed against employers to subsidize an unemployment compensation fund was upheld, and cited by the intervenors in support of their position that the Act is a tax with a public purpose analogous to the Unemployment Compensation Law, is distinguishable.

Moreover, as pointed out in respondent's brief, the monies here involved are exacted and appropriated in one step, with the result that the revenues derived therefrom never become available for the support of the government. Unlike the Unemployment Compensation Law, *N. J. S. A.* 43:21-1, *et seq.*, under which an employer's contributions go into a fund used to provide benefits for all qualifying persons in the State, the monies here sought to be obtained from the respondent employer will be paid over to its former employees alone thereby imbuing the Act with the attributes of an act private in nature. *The Tide-water Co.* v. *Coster*, *supra*.

We also note in passing, although we deem it unnecessary to decide the issue, some reservation as to the Act's constituting a legitimate exercise of the police power in light of respondent's contention that the tax cannot be sustained on that theory because "having been imposed for the benefit of a narrowly constricted class of individuals and having at most a merely incidental or collateral effect on the public welfare, it fails to meet the stringent public purpose test applicable to exercise of the police power."

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

WALTER J. FLECK, et al.,
Plaintiffs,
vs.
WARREN SPANNAUS, et al.,
Defendants.
No. 74 C 3532

STATE OF MINNESOTA } ss
COUNTY OF RAMSEY }

AFFIDAVIT OF PHYLLIS SPIELMAN

Phyllis Spielman, being first duly sworn upon oath, deposes and says:

1. That your affiant is named as a defendant in the above-entitled case and that she is the Administrator of the Pension Protection Division of the Department of Labor and Industry, State of Minnesota (hereinafter the "Pension Division"). This affidavit is submitted in support of the Minnesota defendants' motion for transfer of the above-entitled case to the district of Minnesota, pursuant to 28 U. S. C. A. § 1404(a).

2. That the State of Minnesota's investigative responsibilities under Minn. Stat. ch. 181B (1974) (hereinafter the "Minnesota Pension Act") require the services of certified public accountants and actuaries which must be obtained by way of a consultant contract with an independent accounting and actuarial firm. The State does not have available full-time personnel

with the required expertise to provide the Pension Division with such services.

3. That the initial step in obtaining a consultant contract is to petition to the Legislative Advisory Committee, State of Minnesota, for a transfer of funds from the State's General Contingent Fund to the appropriate State agency. On May 23, 1974, the Pension Division requested the Legislative Advisory Committee to transfer funds in the amount of $10,000 for accounting and actuarial services. That request was approved on June 26, 1974.

4. That, in accordance with State procedures, the Pension Division then sent letters to numerous accounting and actuarial firms indicating the intent of the Pension Division to negotiate a consultant contract and requesting the firms' responses.

5. That subsequently a contract was negotiated with the accounting firm of Segal, Sudit, Rochlin and Lurie, 400 Shelard Plaza South, Minneapolis, Minnesota (hereinafter the "Minneapolis firm"). That contract was executed on September 9, 1974.

6. That following approval of the contract by the State's Departments of Administration and of Finance, a Request for Encumbrance of Funds was issued to the Department of Administration on October 2, 1974. That request was approved on October 8, 1974, in the amount of $10,000, thus enabling the Pension Division to issue payments on its consultant contract with the Minneapolis firm.

7. That the time-consuming legislative and administrative steps in obtaining the consultant contract with the Minneapolis firm outlined above must be followed any time the Pension Division wishes to obtain the services of a consultant.

8. That the Minneapolis firm's duties under the consultant contract include: (a) becoming familiar with the pension plans involved; and (b) determining the number of employees whose vested and non-vested pension benefits under the pension plan are covered by the Minnesota Pension Act, the amounts of such

vested and non-vested pension benefits in accordance with the provisions of the pension plan, and the pension funding charge liability of an employer under the Minnesota Pension Act. These duties have been heretofore carried out primarily by Byron Frank and Joseph Yablonski, certified public accountants associated with the Minneapolis firm.

9. That under the terms of the consultant contract, the Minneapolis firm is expected to obtain actuarial assistance, if need be, in making their determinations. The Minneapolis firm's total compensation and expenses, including the cost of an actuarial assistance, relative to all pension plans affected by the Minnesota Pension Act may not exceed the $100,000 allocated to the Pension Division.

10. That the determinations by the Minneapolis firm necessitate an in-depth study of a given employer's pension plan and trust fund account for that plan, the review of employee records and accumulation of employee information, an application of actuarial assumptions and expertise, and an acquisition of a working knowledge of the terminology and procedures set forth in the Minnesota Pension Act.

11. That should the above-entitled case proceed to trial, the Minnesota defendants intend to call at least Mr. Frank and Mr. Yablonski as witnesses to testify to the plaintiff Allied Structural Steel Company's funding charge liabilities and the methods utilized in determining the amounts of the charge.

12. That the State's funding of the consultant contract with the Minneapolis firm does not contain sufficient funds to pay the expenses of having members of that firm testify in Chicago should the case remain venued there. To encumber additional funds to pay the expenses of their testifying in Chicago or to obtain a similar accounting and actuarial firm in Chicago would necessitate an additional contract subject to the legislative and administrative steps outlined above. Because of the time involved and the potential unavailability of funds, the Minnesota defendants could not be assured of obtaining a consultant as

qualified as the Minneapolis firm for purposes of trial. That, in any event, securing an additional accounting and actuarial consultant firm located in Chicago would result in a duplication of the many hours spent by the Minneapolis firm.

13. That, as presently known by the Pension Division and unless the Minnesota Pension Act is otherwise judicially construed, not only are there potentially 15 Minnesota employees of Allied Structural Steel Company covered by the act, but also the act presently covers approximately 1,500 terminated Minnesota employees of the White Motor Corporation and approximately 30 Minnesota employees of the Thermotech Plastics Division of International Telephone and Telegraph.

14. That by letter dated August 7, 1974, plaintiff Allied Structural Steel Company gave notice to the Pension Division of its intent to terminate the operation of its division in Minnesota and of its previous termination of Minnesota employees. Said letter of notification was not received by the Pension Division until September 11, 1974. A true and correct copy of Allied Structural Steel Company's August 7, 1974, notification letter is attached hereto as Exhibit "A." A true and correct copy of the September 11, 1974, letter transmitting the notification letter to the Pension Division is attached hereto as Exhibit "B."

15. That to date the Pension Division, through the Commissioner of Labor and Industry, neither has certified a pension funding charge to plaintiff Allied Structural Steel Company nor has authorized the commencement of an action to recover a pension funding charge from plaintiff Allied Structural Steel Company.

Further your affiant sayeth not.

Dated: February 11, 1975.

/s/ PHYLLIS SPIELMAN
Phyllis Spielman

[Jurat omitted in printing.]

Supreme Court, U. S.
FILED
MAR 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK, ET AL.,
Appellants,
v.
WARREN SPANNAUS, ET AL.,
Appellees.

On Appeal From The United States District Court For The District Of Minnesota

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INDEX

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
The Minnesota Private Pension Benefits Protection Act Operated To Impair Contract Obligations In Violation of Article I, Section 10, Clause 1 Of The United States Constitution	5
A. The Relevant Legal Principles	5
B. Application of the Relevant Legal Principles to the Facts of the Instant Case	15
1. The Extent of the Impairment	15
2. The "Public Interest" Served	22
CONCLUSION	27

TABLE OF AUTHORITIES

Cases:	Page
Boys Markets v. *Retail Clerks Union*, 398 U.S. 235 (1970)	2
Cort v. *Ash*, 422 U.S. 66 (1975)	2
DeFunis v. *Odegaard*, 416 U.S. 312 (1974)	2
El Paso v. *Simmons*, 379 U.S. 497 (1965)	*Passim*
Fornaris v. *Ridge Tool Co.*, 423 F.2d 563 (1st Cir.) *rev'd per curiam on other grounds*, 400 U.S. 41 (1970)	11, 13, 18, 20
Gateway Coal Co. v. *United Mine Workers of America*, 414 U.S. 368 (1974)	2
Globe Liquor Co. v. *Four Roses Distillers Co.*, 281 A.2d 19 (Del. 1971), *cert. denied*, 404 U.S. 873 (1971)	18-19
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934)	*Passim*
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935)	19
Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330 (1935)	20
Standard Oil Co. of Louisiana v. *Porterie*, 12 F. Supp. 100 (E.D. La. 1935)	20
Superior Motors, Inc. v. *Winnebago Industries, Inc.*, 359 F. Supp. 773 (D.S.C. 1973)	16
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	*Passim*
W. B. Worthen Co. v. *Kavanaugh*, 295 U.S. 56 (1935)	21
White Motor Corp. v. *Malone*, 545 F.2d 599 (1976)	24

Statutory and Constitutional Provisions:	
Minn. Stat. §§ 181B.1, *et seq.*	2
U.S. Constitution, Article I, Section 10, Clause 1	*Passim*

Other Authorities:	
Supreme Court Rule 42(2)	1

IN THE

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WALTER J. FLECK, ET AL.,
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On Appeal From The United States District Court For The District Of Minnesota

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is a federation consisting of a member-

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(2). Letters of consent are on file with the Clerk of this Court.

ship of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 68,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of litigation.[1]

The specific question presented by this case is whether the United States District Court for the District of Minnesota, sitting as a three-judge court, erred in concluding that the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.1 *et seq.* ("Minnesota Pension Act") does not impair contractual obligations in violation of Article I, Section 10 of the United States Constitution. The Minnesota Pension Act is directed against certain employers with existing pension plans who terminated such plans or ceased to operate a place of employment within the state. The Act imposes a pension funding charge on these employers, payable out of their assets, sufficient to fund the value of existing vested pension

[1] E.g., *Malone* v. *White Motor Corp.*, Case No. 76-1184; *Cort* v. *Ash*, 422 U.S. 66 (1975); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

benefits as well as the value of pension benefits for all employees with ten or more years of service. The charge is imposed notwithstanding the fact that the employer's plan did not provide vested benefits for employees with ten years of service and notwithstanding the actual funding provisions of the plan, including express limitations on employer liability.

The effect of the Minnesota Pension Act in this case is to alter retroactively the employment agreement between an employer and his employees by substantially expanding the employer's pension obligations beyond those he agreed to assume in contracts formed prior to the Act's passage. The Act has here operated to impose a heavy liability on an employer which he could reasonably neither anticipate nor avoid, and which cannot simply be passed off as a cost of doing business in the future, all because the pension arrangements which the employer previously entered into with his employees, which were perfectly lawful and proper, are now deemed by the state, acting with hindsight, to be inadequate.

The Chamber and its members are legitimately concerned that the decision of the district court sustaining the constitutionality of the Minnesota Pension Act establishes a dangerous precedent for future state legislation. For if Minnesota can seek to impose a solution of the sort represented by its Private Pension Benefits Protection Act on employers in response to a perceived problem relating to the economic well-being of a very small number and percentage of its citizens, other states can and almost certainly will do the same. To be sure, the perceived problems and solutions will vary. But throughout will run an un-

dercurrent that states, responding to political or other pressure, can conveniently negate existing private contractual provisions of long standing, with only a minimum of justification, and thereby expose employers to significant financial liability essentially retroactive in nature. The Chamber and its members have an obvious and strong interest in avoiding such consequences and, towards that end, in urging this Court to reverse the decision below. For that decision, if permitted to stand, will undermine the constitutional protection against those consequences by giving an unduly narrow reading to the Contract Clause of Article I, Section 10 which is neither legally warranted nor sound from a business or societal standpoint.

SUMMARY OF ARGUMENT

A state statute which impairs private contractual obligations, as does the Minnesota Pension Act, is unconstitutional under the Contract Clause of the United States Constitution (Article I, Section 10, clause 1) unless it reasonably serves an important public interest and the impairment is as minor as is practical to serve that public interest. The Minnesota Pension Act meets neither of these tests, for it severely and unreasonably impaired private employment and pension contracts, did so in furtherance of private and parochial interests, and constituted a radical impairment of contract that was not required to serve any important public interest.

In sum, the Minnesota Pension Act took money from the shareholders of a few businesses and distributed it to a selected few employees of those businesses even though the businesses had never agreed

to pay those moneys and even though the employees had no contractual right to receive those moneys.

To uphold the constitutionality of the Minnesota Pension Act could have an adverse effect upon employers nationwide, for it would allow states to mandate retroactive payment of employment benefits that employers have not anticipated or agreed to pay for work already performed. Indeed, if states may so cavalierly interfere with the employment relationship, they could presumably retroactively reduce wages or benefits below levels employers have agreed to pay in support of the greater public welfare. Such general disruptions of the employer-employee relationship constitute an unreasonable impairment of employment contracts and, at least to the extent of the application of the Minnesota Pension Act, should be declared unconstitutional.

ARGUMENT

The Minnesota Private Pension Benefits Protection Act Operated To Impair Contract Obligations In Violation Of Article I, Section 10, Clause 1 Of The United States Constitution

A. The Relevant Legal Principles

It is undisputed that the Minnesota Pension Act operated in this case to expand the pension obligations of appellant Allied Structural Steel Company, and thereby to impair Allied's contract obligations. The district court specifically found "that the Pension Act impaired Allied's employment agreement" (J.A. A-73), and pointed out that "the State of Minnesota seems to concede that there has been an impairment

of contract" (J.A. A-71). Nor did the state thereafter take issue with that point in the Motion to Dismiss or Affirm the lower court's decision which it filed with this Court.

Article I, Section 10, clause 1 of the United States Constitution (the "Contract Clause") provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." However, it is now well-settled that this prohibition is not absolute and that, in certain circumstances, state legislation which modifies contract obligations may be constitutionally sustained. *El Paso* v. *Simmons*, 379 U.S. 497 (1965) (hereinafter "*El Paso*"); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934) (hereinafter "*Blaisdell*"). Indeed, to conclude otherwise would mean that legitimate state regulations could be avoided by parties merely entering into private contracts. However, the Contract Clause is by no means a nullity and any state statute impairing private contracts must meet certain review standards. Thus, as this Court recently stated in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977) (hereinafter "*United States Trust*"), as a minimum, any state law "intended to regulate existing contractual relationships must serve a legitimate public purpose," and also "must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." To be sure, courts must give due deference "to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23.[3] Yet, because "the Contract Clause

[3] In the *United States Trust* case, this Court held that in assessing whether a subsequent modification of a state's own financial obligations is reasonable and necessary to serve an important public purpose, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 25-26. It does not follow from this, however, that "complete" deference to a legislative assessment of reasonableness and necessity is appropriate when a state has impaired the obligation of a private contract. To conclude otherwise and merely defer to state legislatures would nullify the Contract Clause of the Constitution as it relates to private contracts.

limits otherwise legitimate exercises of state legislative authority," even "the existence of an important public interest is not always sufficient to overcome that limitation." *Id.* at 21.

In essence, then, this Court has stated that, in order to withstand constitutional scrutiny, a state statute impairing contracts must serve an important public interest, and the impairment of private contracts must be reasonable (i.e., as slight as is practical) and must be reasonably related to a fulfillment of the public interest sought to be served.

This principle becomes more apparent when reviewed in light of this Court's holdings in *Blaisdell*, *El Paso* and *United States Trust*. In *Blaisdell*, this Court upheld a state statute postponing mortgage foreclosure sales and extending mortgage redemption periods. Although the lender was unable to obtain possession of the land, or to obtain or convey title in fee, as he would have been able to do had the statute not been enacted, the statute did not impair the integrity of the mortgage indebtedness or the obligation for interest. 290 U.S. at 424-25. Moreover, while the borrower remained in possession, he was required to pay the rental value as that value had

been determined by judicial hearing. Hence, while the lender was debarred from actual possession—although only for a limited time under the terms of the statute—the Court found that, by virtue of the rent to which he was entitled, he received "the equivalent of possession during the extended period." 290 U.S. at 425. In short, notwithstanding the temporary postponement of the remedies available to the lender to obtain the security on his loan, it does not appear that the statute in question caused him to suffer any real substantive loss. Further, to the extent that any harm befell the lender, he was compensated for that loss by virtue of the statutorily mandated rental payments. In addition, the state statute in question was enacted during the depths of the 1930s Depression when economic stagnation and unemployment were resulting in the foreclosure sale of homes at far below the price that would have otherwise been reasonable. Thus, the temporary suspension of a procedural contractual obligation was supported by the public interest which the statute fully served—i.e., relief to homeowners caught in an economic depression. And, at the same time, the statute only slightly impaired substantive contractual rights and obligations.

In *El Paso*, this Court upheld a Texas statute which curtailed the previously unlimited right of a purchaser who had bought and then forfeited state land to reinstate his claim to such land by merely paying the state the accrued interest due. Although this represented a modification of the original sales contract because the right to reinstatement no longer continued into the indefinite future, the statute still permitted reinstatement within five years after forfeiture—a length of time which certainly seems adequate and reasonable by any objective standard. More important, with respect to any loss suffered by the purchaser, the Court simply refused to "believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts [for the purchase of land from the state] on the basis of a defeasible right to reinstatement in case of his failure to perform, or that he interpreted the right to be of everlasting effect." 379 U.S. at 514. Further, the state statute was passed against a history of land sale abuses which the state had a legitimate right to correct and which the statute did in fact correct.

In *United States Trust*, this Court applied the same principles, and held invalid a New Jersey statute which repealed an earlier statutory covenant to Port Authority bondholders that had limited the ability of the Port Authority to subsidize rail passenger transportation from its revenues and reserves. The statutory covenant had been enacted to provide further security to Authority bondholders, and thus to ensure the bonds' marketability. 431 U.S. at 9-10. Faced with the developing energy crisis in 1974, however, the state retroactively repealed the covenant in order to implement the state's plan for encouraging a shift of automobile users to public transportation. *Id.* at 29.

Analyzing this retroactive repeal in the context of an allegation that the repeal violated the Contract Clause, this Court stated that "[a]s with laws impairing the obligation of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."

Id. at 25. While finding that the state's goals of mass transportation, energy conservation and environmental protection were "important and of legitimate public concern" (*id.* at 28), the Court concluded that the repeal "was neither necessary to achievement of the plan nor reasonable in light of the circumstances." *Id.* at 29.

Thus, applying the principles noted above, this Court found that New Jersey had not established the necessity of its action because less drastic measures could have been employed to accomplish the desired public purposes. *Id.* at 29-30. Further, this Court found that the repeal of the covenant was not a reasonable impairment of the contract between the state and the bondholders. Thus, even though the Court could not determine how much financial loss, if any, the bondholders suffered by the repeal (*id.* at 18-19), the Court concluded that the bondholders bought their bonds with the reasonable expectation that the state would not undercut the promised security embodied in the covenant. Even then, the repeal of the covenant might have been reasonable if circumstances had changed to the extent that the bondholders might have otherwise realized a windfall profit or a far more secure loan than they had originally anticipated, and the repeal of the covenant had thus merely returned them to the position they originally expected when they bought the bonds. *Id.* at 31-32. But the facts revealed no such changed circumstances, so that the repeal of the covenant simply eliminated the expected position of security. Accordingly, for the state to impair that security, even in furtherance of an important public purpose, was not reasonable and presented a situation far different from that involved

in the *El Paso* case where, in light of changed circumstances, the Texas statute was "a reasonable means to 'restrict a party to those gains reasonably to be expected from the contract' when it was adopted." *Id.* at 31, *quoting El Paso*, *supra*, 379 U.S. at 515.

Finally, in judging the reasonableness of a state statute's impairment of contractual obligations, it is relevant to analyze whether that statute imposes a retroactive or prospective alteration of the contract and, as in *Blaisdell*, whether the rights being altered are substantive or procedural in nature. Thus, as the First Circuit pointed out in a case which predated but is consistent with this Court's decision in *United States Trust*, "[a]ll courts recognize . . . that retrospective legislation, affecting established rights and relationships, presents an additional problem." *Fornaris* v. *Ridge Tool Co.*, 423 F.2d 563, 566 (1st Cir. 1970), *rev'd per curiam on other grounds*, 400 U.S. 41 (1970). For instance, "[w]hile the legislature may prevent an employee willing to contract to work for a low wage from doing so, West Coast Hotel Co. v. Parrish, 1937, 300 U.S. 379 . . ., the retrospective imposition of a minimum wage would be quite a different matter." *Id.* In short, "'[p]olice power' is not a magic word that permits the legislature to adjust any and every found economic ill without payment." *Id.* at 567. Rather,

> only minor infringement of established contractual rights may be effected without just compensation. . . .
>
> In determining whether retroactive alteration of contractual provisions are sufficiently

minor to be permissible a distinction is sometimes drawn between alteration of substantive rights and alteration of procedures or remedies. *See* Stockholders of Peoples Banking Co. of Smithsberg, Md. v. Sterling, 1937, 300 U.S. 175, 180-183, 57 S.Ct. 386, 81 L.Ed. 586 (alternative holding). However, even the latter may infringe constitutional rights, . . . W.B. Worthen Co. ex rel. Street Improv. Dist. v. Kavanaugh, 1935, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298, while the former can sometimes be tolerated if the effect is not too severe. El Paso v. Simmons, 1965, 379 U.S. 497, 503-508, 85 S.Ct. 577, 13 L.Ed.2d 446. Essentially, the question is, how drastically have property rights been affected, and, particularly, how great is the change viewed in the light of the reasonable expectations of the parties when the contract was entered into. *See* El Paso v. Simmons, *supra;* Home Bldg. & Loan Ass'n v. Blaisdell, 1934, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413. The distinction is one of degree. For example, emergency statutes allowing a tenant to stay beyond the term of his lease upon payment of reasonable rent have been upheld as reasonable alterations, Block v. Hirsch, 1921, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, . . . whereas a statute which would have destroyed a mining company's reserved right to mine coal underneath land, the balance of which had been sold by it, has been invalidated as working a change of too great magnitude. Pennsylvania Coal Co. v. Mahon, 1922, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322. (*Id.*)

Applying this analysis, the First Circuit invalidated [4] a statute which would have imposed substantial monetary liability upon a franchisor who terminated his franchising contract without "just cause," irrespective of the franchisor's right to terminate the relationship at will under the terms of his preexisting franchise agreement.

Thus, in summary, the courts have determined whether a state statute impairing contracts is violative of the Constitution by comparing the extent of contract impairment (including its retroactive or prospective effect, the extent of interference with legitimate expectations of contracting parties and whether the impairment is procedural or substantive) against the extent to which the state's action serves an important public interest and the extent to which that interest could be served by measures having a less drastic effect on contract obligations.

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[4] Because *Fornaris* was concerned with an enactment of the legislature of Puerto Rico and because it was unclear in the circumstances whether Puerto Rico could be deemed a state for purposes of Article I, Section 10, the Court analyzed the case in terms of due process. Nonetheless, as the Court's opinion makes clear, its reasoning was based upon contract impairment cases and would have been precisely the same under Article I, Section 10 if the legislation under review had been that of a state rather than Puerto Rico. In any event, a state statute impairing the obligation of contract in a manner sufficiently harsh and oppressive to violate the Fourteenth Amendment's Due Process Clause would *a fortiori* be deemed to likewise violate Article I, Section 10, under this Court's prior decisions. *Fornaris, supra,* 423 F.2d at 566-67, *citing Thorpe* v. *Housing Authority,* 393 U.S. 268, 278-79 and *Lynch* v. *United States,* 292 U.S. 571, 579 (1934).

Indeed, the district court below paid lip service to the foregoing principles. It recognized that a major consideration "in determining the constitutionality of a particular [contract] impairment is the extent of that impairment" (J.A. A-70). And it agreed "that a factor to be considered in determining the extent of impairment is the legitimate expectations of the contracting parties." *Id.* It also acknowledged "that an impairment can be sustained only if reasonable and necessary to serve important purposes of the state" (J.A. A-71). As we show below, however, the court thereafter refused to apply the principles in any meaningful way. Had it done so, it could not have avoided finding on the undisputed record that the impairment here was substantial, for the Minnesota Pension Act retroactively interfered with major substantive contractual obligations and significantly frustrated the expectations of the parties. Further, proper analysis would have revealed to the district court that the Minnesota Pension Act was essentially special interest legislation for parochial interests which was neither necessary to serve important state purposes nor reasonably related to serving state interests.[8]

[8] The result below cannot simply be explained away on the basis of a differing appraisal of the evidence which this Court, although it might disagree, would be reluctant to disturb. Rather, the district court's treatment of the relevant principles serves seriously to distort those principles—so much so as to suggest that the Contract Clause limitation on state power is illusory. As was pointed out in *United States Trust, supra,* 431 U.S. at 16, even those "modern era" decisions sustaining state regulation against Article I, Section 10 contract impairment claims—i.e., *Blaisdell* and *El Paso*—carefully avoided such an extreme holding.

B. Application of the Relevant Legal Principles to the Facts of the Instant Case

A correct application of the above legal principles to the instant case requires a finding that the Minnesota Pension Act impermissibly impairs contractual obligations. We deal first with the extent of impairment and then the lack of reasonable relationships between the legislation creating that impairment and the public interest it seeks to serve.

1. *The Extent of the Impairment.* Here, the employer, Allied Structural Steel, established a pension plan in 1963 (J.A. A-39) which provided that

> a salaried employee is entitled to full vesting of his pension for early retirement purposes if: (1) he has worked fifteen continuous years and has attained the age of 60; or (2) after he has attained the age of 55 and has worked 20 continuous years, or a lesser number of continuous years of service, which when added to his age equals the sum of 75; or (3) before reaching age 55, he has at least 25 or more years of continuous service such that the sum of his age and continuous years of service equal 80. (J.A. A-40).

The plan, to which employees were not permitted to contribute, provided with respect to the employer's contributions:

> The employers shall make contributions in such amounts and at such times as an actuary shall determine, as shall be necessary to meet the benefits payable pursuant to the Plan. All contributions made by the employers to the Trust shall be irrevocable and shall be used to pay benefits

> under the Plan or to pay expenses of the Plan or Trust, to the extent not paid by the employers. (Appellant's Brief, App. 10a)

The plan further provided that the Company "may terminate the Plan at any time and may direct and require the trustee to liquidate the Trust." In such event, "the rights of all employees accrued to the date of such termination or discontinuance to the extent then funded shall be non-forfeitable and fully vested" (Appellant's Brief, App. 13a). Further, the accumulated assets of the pension trust fund would be applied, first, for the benefit of employees then receiving pensions; second, for the benefit of employees who are then eligible to retire; and, lastly, if any balance remained, for the benefit of all other employees covered under the plan (Appellant's Brief, App. 13a-14a). The plan recognized the possibility that the trust fund's assets might not be sufficient to meet the "equivalent actuarial value of each such employee's pension" in all three, or two, or even one, of the above groups and provided for "pro rata reduction" (Appellant's Brief, App. 13a-14a). The plan further explicitly specified:

> No employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan, and then only to the extent of the benefits payable to such employee out of the assets of the Trust. All payments of benefits as provided for in this Plan shall be made solely out of the assets of the Trust and neither the employer, the trustee, nor any member of the Committee shall be liable therefor in any manner. (Appellant's Brief, App. 17a)

In sum, the Allied pension plan was an agreement between Allied and its employees which set forth certain limited pension rights of employees and committed Allied to no payment or liability beyond contribution levels necessary to fund those limited benefits.

However, in 1974 the state of Minnesota enacted the Minnesota Pension Act which required any employer within that state who employed 100 or more employees, and who provided pension benefits, to fund vested pension benefits for its employees with ten years or more seniority if the employer terminated his business or pension plan.

When Allied began to terminate its Minnesota operation in 1974, "there were insufficient assets in the pension fund to pay the terminated employees after paying all employees who had vested rights under the plan" (J.A. A-68). As shown above, under the terms of the plan Allied would have had no further obligation to those employees. Yet, under the Minnesota Pension Act, Allied's contractual obligation under the plan was expanded to require it to purchase prepaid deferred annuities for all terminated employees with ten or more years of service at an additional cost ranging from $114,171.93 to $185,751.00. Thus, the impairment here was clearly substantive, for unlike the situation in *Blaisdell*, which merely deferred procedural rights, Allied is being required to pay sums it never agreed to pay to its employees.

This was a cost which Allied neither agreed to undertake nor could have reasonably anticipated being required to undertake when it established its plan

and during the period it continued to maintain that plan from 1963 to 1974. On the contrary, Allied was fully justified in believing it could rely on the terms of the plan to protect itself from such liability. For the plan itself not only expressly recognized the possibility of termination, but also expressly provided for distribution of the trust fund assets in that event, fully taking into account the possibility that those assets might be insufficient to provide "equivalent actuarial value" benefits for employees who had already retired, for those who were then eligible to retire, and then for all other employees. Moreover, although the plan obliged the employer to make "contributions in such amounts and at such times as an actuary shall determine," there was no requirement that the actuarial assumptions take into account the possibility of a plant closure, and, in fact, "the possibility of plant closure was not relied upon by the . . . actuaries in calculating plan contributions" (J.A. A-73; *accord*, J.A. A-68).

Nor could Allied's employees have had any reasonable expectation that their employment with Allied would produce pension benefits beyond those established by their pension plan. They might have "hoped" that they would ultimately receive a pension, but no state legislature may convert mere "hopes" into legitimate expectations, particularly where to do so would retroactively force one of the contracting parties (Allied) "into heavy contractual obligations that it never assumed." *Fornaris, supra*, 423 F.2d at 567. See also *Superior Motors, Inc.* v. *Winnebago Industries, Inc.*, 359 F. Supp. 773 (D.S.C. 1973); *Globe*

Liquor Co. v. *Four Roses Distillers Co.*, 281 A.2d 19 (Del. 1971), *cert. denied*, 404 U.S. 873 (1971).[*]

Indeed, by giving Allied's employees pension benefits which they would not have received under the terms of Allied's pension plan, the Minnesota Pension Act produced a windfall for those employees that they could not have anticipated. To sustain a statute providing such a windfall benefit at the expense of the employer would surely be incongruous in light of earlier Contract Clause cases decided by this Court permitting states to enact legislation which *eliminated* windfall benefits notwithstanding that such legislation impaired existing contracts. *United States Trust*, 431 U.S. at 31, n. 30.

Moreover, the costs which the Minnesota Pension Act imposed on Allied were retroactive costs—that is, they represented payments above and beyond what Allied agreed to pay its employees in exchange for work previously performed. As the district court observed, "[e]mployer contributions to pension funds must be recognized as a substitute for present compensation" (J.A. A-77). The Minnesota Act was enacted on April 10, 1974, and Allied began phasing out its Minnesota operation several months thereafter. Hence, the additional liability imposed on Allied as a result of the Act was almost entirely attributable to service performed by Allied employees

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[*] *Cf. Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935) where, using a due process analysis, the Court invalidated a federal statute which, in effect, permitted a defaulting mortgager to redeem the property by paying the mortgagee at the appraised value of the land, which was less than half the face amount of the mortgage.

prior to the Act's effective date. For such past service, the Minnesota statute mandated for those employees with ten or more years of service whose pension benefits had not yet vested additional compensation in the form of pension benefits to which they were not entitled under the established pension plan. This, we submit, is virtually indistinguishable from "the retrospective imposition of a minimum wage" which the First Circuit in *Fornaris, supra,* pointed to as an obvious example of improper retrospective legislation.

Where a state statute has altered existing contractual arrangements to impose a substantial and unexpected retroactive financial burden upon one of the parties, as the Minnesota Pension Act does here upon Allied, courts have found such legislation violative of the Contract Clause. Thus, in *Standard Oil Co. of Louisiana* v. *Porterie*, 12 F. Supp. 100 (E.D. La. 1935), a three-judge court held that a state statute which required employers "to contribute large additional sums of money to the payment of pensions and annuities based upon services long since completed and fully paid for" violated not only the Contract Clause, but the Due Process Clause of the Fourteenth Amendment as well. 12 F. Supp. at 104.[7]

[7] In *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), this Court invalidated on Fifth Amendment due process grounds a federal statute establishing a compulsory retirement pension system which was held to place unjustified burdens on the carriers:

> The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety. (295 U.S. at 349-50).

Further, in *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935), decided shortly after *Blaisdell*, this Court invalidated a state statute which altered the rights of creditors to such an extent that the creditors were effectively without a remedy for six and one-half years, during which period the creditors' right to receive principal and interest was suspended.

In sum, what the state of Minnesota has done with its retroactive imposition of massive new substantive requirements upon employment and pension contracts is to take between $114,000 and $185,000 from the shareholders of Allied and to give that money to selected ex-employees of Allied. And the state has not done this because Allied or its sharehoders acted improperly or otherwise caused harm which might justify a compensatory remedy. Indeed, the basic reason Allied's shareholders must bear this burden now is because their corporation was "foolhardy" enough to provide conditional pension coverage for employees in 1963.

Although it is fashionable today to view corporations like Allied as faceless entities with unlimited assets who can well afford the additional costs of providing pension or other benefits that a state like Minnesota may mandate, that view, even if true, can

be no basis for upholding the Minnesota Pension Act which so blatantly adds retroactive substantive contractual obligations. Indeed, most of this Court's Contract Clause cases have involved corporate parties. Further, of course, the popular view is not accurate, for all corporations are owned by the shareholders who have purchased their shares with the hope of dividends and appreciation, both of which are adversely affected by mandated retroactive costs created by statutes such as the Minnesota Pension Act. If those shareholders include retired workers who are relying upon dividends to finance their retirement, or pension trusts which rely upon dividends as a means of financing the retirement income of retirees, then the state of Minnesota may have effectively taken money from a retiree within its state and transferred it to another resident.

In short, it is difficult to imagine a more blatant infringement of contract than that embodied in the Minnesota Pension Act.

2. *The "Public Interest" Served.* In view of the substantial retroactive impact of the Minnesota Pension Act, and in view also of the decided cases dealing with the Contract Clause and with due process, it is difficult to conceive of any set of circumstances under which that Act could be constitutionally sustained on the basis of an important public interest. Plainly, such circumstances do not exist here.

Thus, unaided by any statements or findings of the Minnesota legislature, the district court set forth

what it assumed were the public purposes to be served by the Minnesota Pension Act.[8]

Thus, the court assumed that the Minnesota Pension Act was the result of a strong interest of the state in protecting the economic welfare of its senior citizens from forfeitures of anticipated retirement income (J.A. A-76). It further assumed that, in enacting this legislation, the state had a proper concern for the economic community in which retired persons lived and that the state could assist that economy by providing retirement income which would sustain the buying power of the residents and reduce demands for welfare assistance (*Id.*).[9] These assumptions, however, are not justified by the facts.

For, clearly, the state could not have been interested in the economic plight of retired persons in general

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[8] The district court cites no statement or finding of the legislature to support what the court assumed to be the public purpose to be served by the Minnesota Pension Act, and the state seems to concede that no such statements or findings exist (Appellee's Motion to Dismiss or Affirm, 12-14).

[9] The court also concluded that an employer's offer of pension coverage takes the place of higher salaries. It is not clear what this has to do with any public purpose to be served by the Minnesota Pension Act, but it may be that the court was concerned that lower salaries had adverse effects upon the general economy of the worker's community, so that the state had a legitimate interest in enacting legislation to ensure that the money that was contributed to pensions would finally find its way back into the community in the form of pension benefits (J.A. A-77). Without taking issue with the court's unsupported conclusions, it appears that this public interest is the same as that discussed above—an interest in the economic well-being of the general community.

or the communities in which they lived, as the statute was directed at an exceedingly small portion of the state's population. Thus, to gain the benefit of the statute an employee would have to be employed by a Minnesota employer who employed 100 or more employees, who had voluntarily established a pension plan, and who terminated his plan or business between April 10, 1974 (the effective date of the Minnesota Pension Act (J.A. A-95 to A-97)) and January 1, 1975 (the effective date of ERISA and the terminal date of the Minnesota Pension Act (J.A. A-67, J.A. A-68)).[10] Further, the employee would have to have worked for ten years for his employer.[11] In addition, the legislature seemed to give

[10] Section 181B.17 of the Minnesota Pension Act provided that the latter "shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States" (J.A. A-102). The court below certified to the Minnesota Supreme Court the question: "Upon what date did the Minnesota Private Pension Benefits Protection Act, Minn. Stat. § 181B.01 *et seq.* (1974) . . . become null and void pursuant to Minn. Stat. § 181B.17?" (J.A. A-66). Pursuant to that certification, "the Minnesota Supreme Court held that the [Minnesota] Pension Act continued in effect until January 1, 1975, when the provisions of ERISA [Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*] preempted the state act and that this preemption preserved the pending causes of action. In other words, the terms of the [Minnesota] Pension Act were in force and applicable to the eleven employees terminated by Allied on July 31, 1974" (J.A. A-68).

[11] It appears also that the Minnesota Pension Act's coverage may be still further restricted by judicial decision to nonunion employers. Thus, in *White Motor Corp.* v. *Malone*, 545 F.2d 599 (1976), the Eighth Circuit held that the Minnesota Pension Act was preempted by the national labor policy embodied in the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, at least insofar as the Minnesota Pension Act applies to employers whose employees are represented by a union and who engage in collective bargaining. The Eighth Circuit's decision is now under review by this Court (No. 76-1184).

no consideration whatever to the retired shareholders of companies like Allied whose expectation of dividends needed for retirement may have been thwarted by the liability imposed by the Minnesota Pension Act (see *supra* p. 22).

If one is left to assume what the Minnesota legislature had in mind (as we must here because the legislature did not state its purpose), it is far more reasonable to assume that the legislature was enacting private legislation, tailored simply to provide pensions to a few residents of its state. That the Minnesota Pension Act is parochial special interest legislation can hardly be doubted considering that it was of such short duration, that it was limited to employers with 100 or more employees (J.A. A-90), that it was passed with full awareness of the forthcoming enactment of ERISA, and that it actually operated to cover relatively few employees.

Even if some public interest was to be served by the Minnesota Pension Act, it cannot withstand constitutional scrutiny under the Contract Clause. Its substantial interference with private contracts could be justified, if at all, by only the most compelling public interest, such as a broad based emergency situation. But no such emergency or other compelling public interest exists. There is no deep-rooted economic and social problem such as that created by

the Depression of the 1930s which justified the temporary emergency legislation sustained in *Blaisdell*. Nor do we have, as in *El Paso*, the Texas size "imbroglio" or "uncertainty of land titles, the massive litigation to which this gave rise, and the pattern of sale and forfeiture [which] were quite costly to the school fund and to the development of land use." 379 U.S. at 515-16. There are not present even the kind of broad and complex regional problems relating to "[m]ass transportation, energy conservation, and environmental protection" (431 U.S. at 28) advanced in support of the state legislation in *United States Trust*, but regarded by this Court as insufficient to justify the contract impairment reviewed in that case.

The Minnesota Pension Act was not enacted to deal with any problem of general state-wide importance affecting large numbers of Minnesota's citizens. It was not the result of extensive legislative investigation on matters of considerable scope and concern. Rather, as the district court found, "[i]t seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan" (J.A. A-79). And as that finding makes clear, the statute was enacted to assist a few private individuals, not in furtherance of any overwhelming and important public purpose.

In these circumstances, even "considerable deference to the policy judgments of the Minnesota legislature" (J.A. A-75) cannot suffice to sustain the conclusion reached by the court below "that the Minnesota legislature in enacting the Pension Act, was

addressing a problem of vital public interest" (J.A. A-78).

Further, even if the legislature had sought in the public interest to protect the retirement hopes of employees and the economy of a few local communities, and even if that public interest might be sufficient to justify some impairment of contract, it is clear that enactment of the Minnesota Pension Act constitutes a far more drastic impairment of private contracts than is reasonably necessary to serve those public interests. Thus, other actions by the legislature might have had the desired effect, such as a state law mandating prospective employer or taxpayer contributions to a fund to insure the benefits of employees who did not receive pensions despite ten years' employment. Alternatively, those relatively few employees who were the object of legislative concern could have been compensated out of the general state treasury. Significantly, even the district court conceded that "the legislature might have adopted a less drastic means to accomplish its purpose" than the provisions of the Minnesota Pension Act (J.A. A-79).

CONCLUSION

The Minnesota Pension Act has effected a substantial impairment of contract obligations; it was neither reasonable nor necessary to serve any vital public purposes; and alternate, less drastic means were available, in any event, to alleviate the perceived problem. Of course, it may have been politically more facile for the Minnesota legislature to simply rewrite the preexisting pension arrangements Allied and other employers had with their employees, and to

impose thereby a major retroactive liability on these corporations. But that is precisely what the Contract Clause in Article I, Section 10 was designed to prevent.

Accordingly, it is respectfully submitted that the Minnesota Private Pension Benefit Protection Act constitutes an unconstitutional impairment of private contracts and that this Court should reverse the judgment of the district court and direct it to enjoin enforcement of that Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK, ET AL.,

Appellants,

vs.

WARREN SPANNAUS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

SUPPLEMENTAL BRIEF OF APPELLANT ALLIED STRUCTURAL STEEL COMPANY

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TABLE OF CONTENTS

	PAGE
Opinion of the Court of Appeals of New York	1
Conclusion	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

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OPINION OF THE COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, COURT OF APPEALS

No. 166

HEALTH INSURANCE ASSOCIATION OF AMERICA, ET AL.,

Appellants-Respondents,

vs.

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,

Respondent-Appellant.

(166) Sidney S. Rosdeitcher, Robert S. Smith, John Charles Boger & Roger E. Schechter, NY City, for appellants-respondents.

Louis J. Lefkowitz Attorney-General (Arnold D. Fleischer, Samuel A. Hirshowitz & George D. Zuckerman of counsel) for respondent-appellant

JONES, *J.*

The 1976 legislation mandating the inclusion of maternity care coverage in health and accdient insurance policies issued after January 1, 1977 is not unconstitutional as to its substantive provisions; however it may not constitutionally require the addition of such coverage to policies in existence before that date but thereafter renewed, if the renewal is at the option of the insured alone without the consent of the insurer.

As a part of his legislative program, the Governor submitted to the 1976 Legislature what has become known as the Mandatory Maternity Care Coverage Law. When enacted as chapter 843 of the Laws of 1976 on July 26, 1976 it added to the Insurance Law sections 162-a and 164-a and subdivision 1-a of section 253, the effect of which was to require that health insurance policies "written, altered, amended or renewed" after January 1, 1977 include coverage for maternity care to the same extent that hospital service and medical expense indemnity are provided under the policies for illness or disease. Maternity care coverage could be limited to reimbursement of covered expenses for maternity care for a period of four days of hospital confinement and to persons covered under the policy for a period of 10 months, or for a lesser period if the pregnancy commenced while the insured was covered by the policy. The coverage is not required to be included in policies issued to public employers or pursuant to plans sponsored by public employers.[1]

1. The new § 162-a, applicable to group or blanket accident and health policies, provided:

> "Every policy subject to the provisions of section one hundred sixty-two which provides hospital, surgical or medical coverage shall provide coverage for maternity care, including hospital, surgical or medical care to the same extent that hospital, surgical or medical coverage is provided for illness or

(Footnote continued on next page.)

In his memorandum in support of the legislation the Governor stated:

> "This bill, by providing essential maternity coverage, recognizes that for younger persons the greatest single need for health insurance protection coverage is for maternity care. Rising hospital and medical costs have made payment for maternity care a great financial burden for younger people at a time when many are unable to meet the burden.
>
> "The bill also recognizes the insurance concept of sharing of risk among a broad base of the population, particularly recognizing that the young should have their special areas of health concern adequately covered just as the older population is covered for illnesses or diseases more likely to affect them."

On January 7, 1977 plaintiffs, the trade association of insurance carriers writing individual and group health insurance policies and 22 of the carriers themselves, commenced the present action for a judgment declaring the 1976 statute unconstitutional and enjoining its enforcement by defendant Superintendent of Insurance. By separate causes of action three attacks were mounted. The first cause of action alleged that the Mandatory Maternity Care Coverage Law deprived plaintiffs of property without due process of law by prohibiting them from

(Footnote continued from preceding page.)

> disease under the policy, provided, however, that such maternity care coverage, other than coverage for complications of pregnancy, may be limited to reimbursement of covered expenses for maternity care for a period of four days of hospital confinement. Maternity care coverage may also be limited to those persons covered under the policy for a period of ten months, or for a lesser period if the pregnancy commenced while the insured was covered by the policy. The requirements of this section shall not be applicable, however, to any policies which have been or shall be issued to any 'government' or 'public employer', as those terms are defined in paragraph a of subdivision six of section two hundred one of the civil service law."

Similar provision was made in § 164-a with respect to individual accident and sickness policies and in subdivision 1-a of §-253 with respect to contracts issued by hospital service and other non-profit corporations.

selling health insurance policies without the specified maternity care coverage and by requiring plaintiffs to sell a type of coverage they may not want to sell and buyers to buy a type of coverage they may not want to buy, at additional cost, such that plaintiffs will be deprived of substantial revenues as a result of the purchasers' unwillingness to buy. It was asserted that no need exists to justify such a substantial interference with insurers and insureds. The second cause of action alleged that any application of the statute by defendant to guaranteed renewable and noncancellable policies renewed after January 1, 1977 would work an impairment of contractual obligations in violation of Article I, section 10 of the United States Constitution. The third cause of action asserted that, by reason of failing to provide adequate time for compliance, including time to obtain guidelines and approval from defendant Superintendent of Insurance of forms and premium rate changes, the statute deprived plaintiffs of property without due process. After an answer had been filed, cross-motions for summary judgment were made by the parties.

Special Term granted defendant's motion as to the first cause of action and plaintiffs' motion as to the second cause of action; it declared that chapter 843 of the Laws of 1976 does not violate constitutional due process provisions and is a valid exercise of police power in mandating maternity care coverage, but that the statute may not, consonant with constitutional requirements, be applied to existing health and accident policies as to which plaintiffs have no choice but to renew at the option of the policyholders. With respect to the third cause of action, the court found that material issues of fact were presented as to the adequacy of the time for compliance given by statute and as to claimed delays by defendant making timely implementation impossible; it therefore denied both motions for summary judgment addressed to this cause of action and directed a prompt trial. The injunctive relief sought was also denied. The Appellate Division affirmed the dispositions by the justice at Special

Term. We too affirm as to the first and second causes of action and dismiss the appeal as to the third cause of action.

In support of their claim asserted in the first cause of action that the substantive provisions of the statute violate due process plaintiffs contend that what are described as the burdens it imposes on insurers (to provide a form of coverage plaintiffs may prefer not to supply) and on policyholders (to purchase a form of coverage some may prefer not to receive) are not justified by any rational relation to a valid public purpose. We disagree.

At the outset we observe that insurance is "a business to which the government has long had a 'special relation' " (*California Auto Assn* v *Maloney,* 341 US 105, 111); regulation of the industry, closely related as it is to the public interest (*Matter of Massachusetts Mut. Life Ins. Co.* v. *Thacher,* 15 AD2d 242, 247), "is surely a proper subject for the state's exercise of its police power" (*Country-Wide Insurance Co.* v *Harnett,* 426 F Supp 1030, 1035, affd 431 US 934). "[I]t is competent for the legislature, in the interest of the people to promote the general welfare, to regulate insurance companies and the management of their affairs, and to provide by law for that protection of policy holders which they could not secure for themselves" (*People* v *Formosa,* 131 NY 478, 483). "[T]he business of writing insurance is not a right; it is a privilege granted by the State subject to the conditions imposed by the State and to its control and supervision" (*Matter of People* [*Int. Workers Order*], 199 Misc 941, 967, affd 280 AD 517, affd 305 NY 258, cert den 346 US 857).

Plaintiffs do not dispute the right of the Legislature to regulate the insurance industry, nor do they deny that the patent objective of the 1976 legislation—to remedy the absence of adequate insurance coverage for rapidly rising maternity care costs falling on young families usually of moderate income—

addressed a legitimate public need.[2] Their quarrel is with the means selected to achieve the legislative goal.

We first note that it has long been recognized that what constitutes required due process varies with the status of the party asserting that there has been a denial thereof as well as with the governmental function involved (cf. *Goldberg* v *Kelly*, 397 US 254, 263; *Dobkin* v *Chapman*, 21 NY2d 490, 502). Though the test for determining whether due process has been accorded may be said to be constant—i.e., whether there has been protection of the individual against arbitrary action (*Ohio Bell Tel. Co.* v *Commission*, 301 US 292, 302)—the specifics required to satisfy the standard may differ. Thus, for example, the procedural due process owed to a tenured teacher with a vested right in a position is not the same as that to which a probationary teacher is entitled (*Board of Regents* v *Roth*, 408 US 564).

Turning then to plaintiffs' challenge, we reiterate that a reasonable exercise of the State's police power is not constitutionally infirm as violative of the due process clause (*Nettleton Co.* v *Diamond*, 27 NY2d 182, 196). When a statute is challenged on nonprocedural grounds as violative of due process of law the question is whether there is some fair, just and reasonable connection between it and the promotion of the health, comfort, safety and welfare of society (*Montgomery* v. *Daniels*, 38 NY2d 41, 54; *People* v *Bunis*, 9 NY2d 1, 4). Judicial inquiry begins with the recognition that as a matter of substantive law every legislative enactment is deemed to be constitutional until its challengers have satisfied the court to the contrary and that

2. The reality of the need is documented by statistics included in the record disclosing increases of 50% in some hospital maternity room rates in the four years immediately preceding enactment of the statute, such that medical expenses incident to the birth of a child were reaching and exceeding a figure of $2000; availability of maternity care insurance, on the other hand, was quite limited and, when available, benefits usually amounted to only a small part of the costs customarily incurred. A report issued in 1974 by the Senate Task Force on Critical Problems stated that the average family was not able to accumulate by savings in the months preceding delivery the funds necessary to meet the expenses of childbirth.

the Legislature is presumed to have investigated and found the existence of a situation indicating the need for and the desirability of the statute (*Montgomery* v *Daniels*, 38 NY2d 41, 54, *supra*). Whether the enactment of chapter 843 of the Laws of 1976 be examined as an exercise of police power, the reasonableness of which must be measured against the foregoing standard (as plaintiffs seem to contend by the authorities they cite), or whether it be examined as an exercise of the Legislature's regulatory authority over the insurance industry—to which perhaps a less stringent standard of scrutiny is applicable[3]—we find no difficulty in concluding that the substantive provisions of the legislation do not deprive plaintiffs of due process of law.

It is clear, at least at this time and on a record compiled only shortly after the effective date of the statute, that the mandate of the legislation for provision of maternity care coverage in individual and group health insurance policies may be expected to be an effective method of meeting the need for such coverage identified at the time of submission and adoption of the legislation. Whereas, under conditions as they existed prior to January 1, 1977, benefits to compensate for medical expenses incident to childbirth were not widely available and, to the extent available, were not nearly adequate to provide a significant measure of protection against such expenses, after the effective date of chapter 843, coverage would be provided to

3. In *People* v *Formosa* (131 NY 478) in reviewing an attack on a statute regulating the conduct of the life insurance industry, after discussing the authority of the Legislature under the police power, the Court stated at pages 483 and 484: "We have no occasion now to specify to what extent [the police power] might reach, or in any way to place upon it its proper limitations, because, in order to justify the act in question, it is not necessary to resort to that power. * * * The power exercised over these insurance companies and their agents is similar to that exercised by the legislature over banks and railway corporations; and it has never been doubted that such power exists, and the legislative power to regulate them and their agents in the minutest particular in the interest of the public, has never been questioned." See also *Merchants Mutual Automobile Liability Ins. Co.* v *Smart* (267 US 126, 129).

the broad segment of the population who enjoy coverage against medical expenses occasioned by illness or disease and to the same extent as such latter coverage. That the extension of protection thus accomplished will be substantial is demonstrated by plaintiffs' own estimate of premiums to be generated by such coverage as running in the millions of dollars annually. Whether plaintiffs' apprehensive speculation that the inclusion of maternity coverage in health insurance policies with resulting increases in premiums will bring about a consequent loss of business to insurers as insureds terminate or curtail their health insurance coverage will prove to be justified, cannot now be determined. In this respect the present case differs significantly from *Defiance Milk Products Co.* v *DuMond* (309 NY 537), relied on by plaintiffs. In *Defiance* the challenge to the statute was mounted after it had been in effect for more than 30 years and when the Court could say, based on practical experience, that the regulation requiring sales of evaporated milk in no less than 10-pound containers accomplished an exclusion of the product from sale within the State because "the minimum quantity so specified is many times larger than could or would be sold and purchased in a retail food shop" (309 NY 537, 540). Whatever may be plaintiffs' anticipation, in no way may the statute here in question—which in terms prohibits nothing—now be regarded as a prohibition on the sale of a nondeleterious product, as in fact could the statute in the *Defiance* case.

Plaintiffs' argument that there is a fatal defect in the legislation because its result will be to impose a part of the cost of maternity care coverage, through increased premiums occasioned by such coverage, on purchasers of health insurance policies who do not want, or do not need, protection against the expenses of childbirth is refuted by the concept—basic to insurance—of risk sharing, a factor consciously taken into account when the legislation was fashioned. Additionally, the extent to which the cost of maternity care coverage falls on a particular group—as, for instance, the elderly—is determined

by the manner in which the cost of the benefits is allocated among the insureds, a subject as to which no provision was included in the legislation and which was therefore left for initial address by the insurers in preparing and seeking approval of premium rate schedules.

Totally without merit as a basis for invalidating chapter 843 is plaintiffs' argument that "the effect of the new law is to require the entire burden to be borne by the existing health insurance system; persons who do not happen to have health insurance are wholly exempt from bearing the burden of maternity coverage". The principle incorporated in this self-evident statement is equally applicable to any type of insurance—thus, the entire burden of automobile liability coverage is borne by the existing automobile liability system; persons who do not happen to have such insurance are exempt from bearing the burden of liability coverage. That fact, however, does not present any basis for invalidating the mandated coverage.

Nor is there merit to plaintiffs' contention that they are being compelled to enter a different and more hazardous business than that in which they choose to be engaged. The determination by Special Term that the statute does not require insurers to enter into a new business but merely to include a health care expense not previously covered is sound and provides a valid basis for distinguishing *Hartford Accident & Indemnity Co.* v *Ingraham* (290 NC 457), so strongly relied on by plaintiffs. The statute there under attack did in fact require general liability insurance carriers to add a new coverage (malpractice insurance) to their offerings. While the question might be regarded as one of degree, we perceive the extension from general liability to malpractice insurance to be both substantially greater in degree and different in kind from the inclusion of maternity care coverage within that of hospital and medical expenses for illness and disease; the comparison here is closer to the home health care provisions required to be included in accident and sickness policies by subdivisions 7-f to 7-j of section 164 of the Insurance Law.

Finally, concluding that plaintiffs have failed to establish that section 843 of the Laws of 1976 is unfair, unjust or arbitrary and thus a deprivation of due process, we note, in response to plaintiffs' assertion that other—and in their view, better—means could have been found to meet the objective of making maternity care coverage widely available, that the choice of means was within the legislative prerogative; its wisdom in exercising its discriminating authority, absent an unconstitutional selection, is beyond the scope of judicial review (*Montgomery* v *Daniels*, 38 NY2d 41, 56).

Turning to plaintiffs' second cause of action on which judgment has been granted in their favor declaring that chapter 843 may not, consonant with constitutional restrictions on impairment of obligations of contract, modify policies issued by plaintiffs as guaranteed renewable policies (those issued before the effective date of the statute which, though the premiums might be increased, plaintiffs have no choice but to renew at the option of the other party to the insurance contract), we agree with the determination by the courts below (*Moore* v *Metropolitan Life Ins. Co.*, 33 NY2d 304). The holding in *Moore* that "where * * * the insurer does not have the right to terminate the policy or change the premium rate without consent of the [insured], renewal, by the payment of premiums merely continues in force the pre-existing policy, and statutes enacted subsequent to its original enactment cannot be applied" is dispositive of this cause of action (*Moore* v *Metropolitan Life Ins. Co.*, 33 NY2d 304, 312, *supra;* cf. *Char-Mo Investors, Inc.* v *Market Insurance Company* [..... NY2d ....., decided herewith]). Defendant's reliance on the existence of a right in the insurers to increase premiums on provision of maternity care coverage as sufficient to satisfy the requirements set forth in *Moore* as prerequisite to the validity of statutory modification of insurance contracts is misplaced. What is required is a choice open to the insurer to increase premiums or in the alternative, if it so elects, to terminate—thus, fail to renew—the policy and

escape the added risk imposed by the statutory modification; the right to increase premiums alone is not sufficient (*Mulligan* v *Travelers Ins. Co.*, 280 App Div 764, affd 306 NY 805).

Defendant's attempt to justify and to uphold the impairment of contract rights and obligations, which would be impermissible under *Moore* if section 843 were given effect with respect to guaranteed renewable policies, is not persuasive. Cases such as *Home Building & Loan Assn* v *Blaisdell* (290 US 398), cited by defendant, in which a compelling public interest, in face of what amounts to an economic emergency of broad scope and ramification, takes precedence over individual contract rights occur but infrequently. Only on rare occasions and in extreme circumstances do rights fixed by the terms of a contract willingly entered into give way to a greater public need (cf. *Matter of Subway-Surface Supervisors Assn* v *New York City Transit Authority*, 44 NY2d ....., dec. March 28, 1978; *United States Trust Company* v *New Jersey*, 431 US 1.) In the present case, while there was a genuine, identifiable public purpose to be served by the enactment of chapter 843, the predicament which spawned the legislation had not risen to the magnitude of a crisis which warranted overriding the terms of the agreements entered into by the parties to the guaranteed renewable health and accident policies.

For the reasons stated, the order of the Appellate Division should be affirmed, without costs, except that on defendant's appeal the third cause of action should be deemed severed and his appeal with respect thereto dismissed for non-finality.

* * * * *

On plaintiffs' appeal:

Order, insofar as appealed from, affirmed, without costs.

On defendant's cross appeal:

Cross appeal, from so much of the Appellate Division order as affirmed the denial of defendant's motion for summary judgment with respect to plaintiffs' third cause of action,

dismissed upon the ground that such portion of the order appealed from does not finally determine the action within the meaning of the Constitution; order otherwise affirmed, without costs.

Opinion by JONES, J.

All concur.

Decided May 2, 1978

CONCLUSION.

For the reasons stated in the accompanying Petition for Leave to File, we respectfully submit this Supplemental Brief for the Court's consideration.

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